Diversified Bank Installations, Inc. *and* International Association of Bridge, Structural and Ornamental Iron Workers, Local Union 512, AFL–CIO. Case 18–CA–13928

September 26, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

The issues presented in this case[1] are whether the judge correctly found that the Respondent interrogated employees and threatened to close its business, in violation of Section 8(a)(1) of the National Labor Relations Act; discharged employee Scott Harrington because of his union and other protected concerted activities, in violation of Section 8(a)(3) and (1) of the Act; and, finally, repudiated its collective-bargaining contract with the Union, failed to provide relevant information requested by the Union, refused to bargain, and withdrew recognition from the Union, in violation of Section 8(a)(5) and (1) of the Act. The National Labor Relations Board has considered the decision and the record in light of the exceptions and brief[2] and has decided to affirm the judge's rulings, findings[3] and conclusions and to adopt the recommended Order.[4]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Diversified Bank Installations, Inc., Lake Elmo, Minnesota, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] On April 11, 1997, Administrative Law Judge William J. Pannier issued the attached decision. The Respondent filed exceptions and a supporting brief.

[2] The Respondent has requested oral argument. That request is denied as the record, exceptions, and brief adequately present the issues and positions of the parties.

[3] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[4] The judge inadvertently cited the wrong authority for computation of interest on amounts owed by the Respondent to remedy its unfair labor practices. Interest shall be computed in accord with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Florence I. Brammer, Esq., for the General Counsel.
Michael J. Galvin Jr. and *Lydia P. Crawford, Esqs. (Briggs and Morgan)*, of St. Paul, Minnesota, for the Respondent.

DECISION

STATEMENT OF THE CASE

WILLIAM J. PANNIER III, Administrative Law Judge. I heard this case on November 5 and 6, 1996, in Minneapolis, Minnesota. On September 18, 1996, the Regional Director for Region 18 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing, based on an unfair labor practice charge filed on February 9, 1996, and amended on March 4, 1996, alleging violations of Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act). All parties have been afforded full opportunity to appear, to introduce evidence, to examine and cross-examine witnesses, and to file briefs.

Based on the entire record,[1] on the briefs which were filed, and on my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. INTRODUCTION

Diversified Bank Installations, Inc. (Respondent) is a Wisconsin corporation with an office and place of business in Lake Elmo, Minnesota. To the extent pertinent to this proceeding, it engages in the business of installing vaults, night depositories, drive-up facilities, and automated teller machines in banks.[2] All parties agree that, in the course of performing that work, Respondent is ''an employer engaged primarily in the building and construction industry,'' within the meaning of Section 8(f) of the Act.

Although Respondent installs the above-described equipment at banks, only occasionally does it do so on the basis of a direct relationship with a bank. Most of its installations are performed directly for bank equipment companies which, in turn, have contracted with the banks. For example, approximately 40 percent of Respondent's installation business is with bank equipment company LeFebure Corporation, approximately 30 percent of that business is with Diebold, Incorporated, and approximately 5 percent of it is with independents such as Security Products.

While it performs installation work in a number of States, most of Respondent's installation is performed in nine States, one of which is Minnesota. Approximately 90 percent of its work is performed at locations outside of the Minneapolis-St. Paul metropolitan area. Only approximately 20 percent of that installation business is related to new bank construction, with the vast majority of it being performed on a remodeling basis.

Ordinary installation of a bank vault takes two to three employees approximately 3 days. Usually it assigns two employees to install an automatic teller machine and a like number to install a night depository, which would each take

[1] The motion to correct transcript is granted so that the date ''1993'' on L. 23 of p. 287 is corrected to read ''1983.''

[2] Respondent admits that, at all material times, it has been engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act, based on the admitted facts that during calendar year 1995 it derived gross revenues in excess of $500,000; sold goods valued in excess of $50,000 which it shipped directly from Minnesota to points outside of that State; and purchased goods valued in excess of $50,000 which were received in Minnesota directly from sources outside of that State.

approximately 4 hours on new construction and typically 12 hours for a remodeling project. One proficient employee can install one conventional drive-up lane in a day. In short, no particular installation project consumes a very long period of time, nor does it occupy a very large number of employees.

Respondent is co-owned equally by Daniel R. and Janet M. Bauer, husband and wife. At all material times he has served as its president, while she has occupied the position of vice president. Each, it is admitted, has been a statutory supervisor and agent of Respondent at all material times. According to Janet Bauer, Respondent's total employee complement varies between 15 and 18 in number. Aside from office personnel, those employees work in its shop, assembling and sometimes fabricating automated teller machine accessory components, remodeling and servicing equipment, and receiving and warehousing equipment for installation. To perform installations, Respondent employs field employees, although Daniel Bauer testified, ''we've had quite a bit of overlap depending on the workload in the shop or the workload in the field.''

Field employees are classified as lead installer, installer, helper, and mechanic. No one contends that lead installers—the crew leaders who, according to Daniel Bauer, ''make[ ] the major decisions and interface[ ] with the customer or contractor'' at bank sites where installation occurs—are statutory supervisors or agents of Respondent. At the time of the hearing lead installers were John Haehn, who has worked for Respondent since it went into business during 1993, and Steve Ruter. During 1983 Jerry Wienke also began working for Respondent and he was a lead installer when he left employment with Respondent, shortly before the hearing, to go into business for himself.

Daniel Bauer testified that, at the time of the hearing, Respondent employed ''approximately twelve'' employees in field and shop classifications. Two of those employees—Vinh Vo Bauer and Chris Bauer—are sons of the Bauers, but only one of them works full time. A third employee is nephew Jeff Bauer who works whenever business becomes busy.

During June 1995[3] Respondent twice interviewed and, then, hired Scott Harrington as an installer. He would continue working for Respondent until Friday, November 17, when he was discharged by Daniel Bauer. It was Daniel Bauer who made that discharge decision. He testified that his reasons for doing so had been ongoing unsatisfactory work by Harrington and customer complaints about Harrington and about Harrington's work.

The General Counsel alleges that the actual motivation for Harrington's discharge had been retaliation for his concerted activities for mutual aid and protection of Respondent's employees, in violation of Section 8(a)(1) of the Act and, also, retaliation for Harrington's sympathy for, and activities on behalf of, International Association of Bridge, Structural and Ornamental Iron Workers, Local Union 512, AFL–CIO (the Union),[4] thereby violating Section 8(a)(3) and (1) of the Act. In partial support of those allegations, the General Counsel points particularly to a November 19 conversation between Daniel Bauer and employee Tim Lynch. During it, alleges the General Counsel, Bauer coercively interrogated Lynch and threatened to close if forced to pay union scale wages and benefits to Respondent's employees, thereby violating Section 8(a)(1) of the Act. For the reasons discussed in section III, infra, I conclude that a preponderance of the credible evidence supports the allegations that Daniel Bauer's November 19 remarks to Lynch did violate Section 8(a)(1) of the Act and, further, that a balancing of the credible evidence supports the conclusions that Respondent's discharge of Harrington violated Section 8(a)(1) and (3) of the Act.

The other primary area involved in this proceeding arises from the not unrelated allegations that Respondent violated Section 8(a)(5) and (1) of the Act. When Harrington began working for it, Respondent was not then a party to any collective-bargaining relationship with the Union. There had been a collective-bargaining contract between those parties. It had been a contract valid under Section 8(f) of the Act and had a stated effective term of May 1, 1992, to April 30, 1995. There is no contention that, as to Respondent, that contract had been renewed automatically. Nor is there a contention that Respondent and the Union had entered into a succeeding contract when the 1992–1995 contract had expired by its terms.

In late September, however, Respondent was scheduled to perform installation work at Highland Park Bank. Dispatched to perform that work were Harrington, helper installer Mike Blaisdell, and nephew Jeff Bauer. They were turned away from the site by the assistant superintendent when none of them could produce ''a union card.'' The assistant superintendent did suggest that if Respondent's employees returned on the following day, when the superintendent would be there, the superintendent might allow them to work without union cards. Told about that statement, Janet Bauer directed Harrington and installer Jeff Peterson to return the following day, to ascertain if they would be permitted to work. But, they were not allowed to do so.

When Harrington or Peterson telephoned Janet Bauer to inform her of what had occurred, she then telephoned the Union, speaking with business manager, financial secretary, Treasurer Gordon Thomas Struss. She asked about signing a contract with the Union and obtaining temporary work permits[5] for Respondent's employees to work at the Highland Park Bank. He replied that the Union would enter into a contract with Respondent and, given the unavailability of employees to dispatch from its hiring hall, would issue temporary work permits for Respondent's employees to work on that project. As discussed further in section II, infra, the parties did execute a collective-bargaining contract, article 6 of which contains a hiring hall provision, and work permits were issued to Harrington and Peterson who then went to work on the Highland Park Bank project.

The contract which Respondent executed is concededly one ''covering employees engaged (or who, on their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members,'' within the meaning of Section 8(f) of the Act. In consequence, under the Act, it matters not whether a majority of those employees covered

[3] Unless stated otherwise, all dates occurred during 1995.

[4] At all material times, the Union has been a labor organization within the meaning of Sec. 2(5) of the Act.

[5] Struss explained that ''a work permit is a temporary permit that we issue to employees of signatory contractors during the period it takes to bring them in and make them union members.''

by the contract had designated the Union as their bargaining agent.

Respondent executed a contract with a stated term of May 1, 1995, to April 30, 1998. Literally, it covers only employers who are members of, or who execute the contract through, Minneapolis Builders Division and St. Paul Builders Division and Outstate Builders of Associated General Contractors of Minnesota (AGC). However, that is no more than the form of the contract document which, it is undisputed, Janet Bauer did sign on behalf of Respondent. Inserted at the top of the contract which she signed is the name, as a party to it, of ''Diversified Bank Installations, Inc.'' of Lake Elmo, Minnesota. Respondent does not dispute that it had become a party to that contract, as a result of its co-owner's execution of it.

Respondent admits that it has not provided contractually specified wages and benefits to all employees covered by the 1995–1998 contract. However, it contends that, when Janet Bauer executed the contract, Respondent had understood that the recognition provision and the contract's terms would apply only to employees dispatched by the Union. As to employees hired directly by Respondent, even ones who receive temporary work permits from the Union, Respondent contends that a practice had arisen and existed, under prior contracts with the Union, of exempting those employees from coverage by the Union's contracts. As a result, argues Respondent, the Union is now estopped from contending that Harrington, Peterson or any other employee whom Respondent hires directly—as opposed to being dispatched by the Union through its hiring hall—are represented by the Union and covered by the terms of its current contract with the Union.

The Union's current officials, and one who is retired, deny that there ever had been a practice of applying the terms of its contracts with Respondent only to employees dispatched to Respondent's projects by the Union. Based on those denials, as well as on contract principles developed under the Act, the General Counsel alleges that Respondent has violated Section 8(a)(5) and (1) of the Act by having failed and refused to fully honor the 1995–1998 contract, a failure which, further alleges the General Counsel, rises to the level of a repudiation of that contract.

As will be seen in section II, infra, when Harrington and others began complaining to the Union that they were not being compensated according to the terms of the current contract, Struss telephoned Janet Bauer during November and met with her on December 7. However, she told him that Respondent would have to go out of business if forced to honor the contract's terms for all of Respondent's field installation employees. With the matter still unresolved by December 26, Struss sent a letter to Janet Bauer, reasserting the Union's position that all employees performing work covered by the contract were entitled to receive the contractually prescribed wages and benefits and, further, requesting another meeting ''to resolve not only the Union's concerns, but yours, the Employer's, as well.'' In addition, the letter requests,

> a certified copy of the payroll records of [Respondent], for the period beginning on September 27, 1995 through the present. The payroll records requested should show the names, addresses and social security numbers of all company employees covered by the Collective Bargaining Agreement; the gross and net wages, rate(s) of pay, hours worked for each individual employee and the employment status (foreman, supervisor, shop personnel or field installation, etc.), for each individual employee and the fringe benefit fund contributions credited for each hour worked for each individual employee.

As the basis for requesting that information, the letter states that Respondent is obliged to produce it pursuant to article 19 of the 1995–1998 collective-bargaining contract. In pertinent part, that article states that, ''In case of a dispute arising over hours and wages, the Union shall have the right to examine the payroll records of the individual Employee covered by this Agreement upon which there is a dispute.''

Struss' December letter also states that the Union ''requests a list of all jobs performed by [Respondent], in the past 2 years, as of December 26, 1995.'' In contrast to the above-quoted request for payroll information, however, the letter states neither contractual basis nor other reason for requesting that information.

Respondent did not reply to the letter. So, by letter dated January 17, 1996, the Union renewed its request to Janet Bauer for the information and, again, requested that a meeting be scheduled. This letter also went unanswered. As a result, the General Counsel alleges that Respondent has been refusing to meet with the Union and has effectively withdrawn recognition of it as the bargaining agent of employees covered by the contract, in violation of Section 8(a)(5) and (1) of the Act. Those sections of the Act have been further violated, the General Counsel alleges, by Respondent's failure and refusal to provide the information requested in the Union's December 26 letter. For the reasons set forth in section II, infra, for the most part I conclude that Respondent has violated Section 8(a)(5) and (1) of the Act as alleged by the General Counsel.

II. THE ALLEGED BARGAINING VIOLATIONS

Under the proviso to Section 8(d) of the Act, ''the duty to bargain collectively shall also mean that no party to [a collective-bargaining] contract shall terminate or modify such contract,'' except as specified by that proviso. That provision is one expression of ''the federal labor policy that parties to a collective-bargaining agreement must have reasonable assurance that their contract will be honored.'' (Citation omitted.) *W. R. Grace & Co. v. Rubber Workers Local 759*, 461 U.S. 757, 771 (1983). That labor policy is rooted in the general tradition of Anglo-American jurisprudence that one must perform his written contract. See *E. G. & G. Rocky Flats*, 314 NLRB 489, 490 (1994). Therefore, an employer violates Section 8(a)(5) and (1) and Section 8(d) of the Act whenever it fails to honor a collective-bargaining contract by applying its terms to all employees covered by that contract. See, e.g., *Ortiz Funeral Home Corp*., 250 NLRB 730 (1980).

The General Counsel alleges that the appropriate bargaining unit is the one spelled out in the current contract between the Union and Respondent. Of course, that is consistent with the Board's interpretation of Section 8(f) of the Act. *John Deklewa & Sons*, 282 NLRB 1375 (1987), enfd. sub nom. *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988), cert. denied 488 U.S. 889 (1988). According to the General Counsel, that unit is all full-time and regular part-time em-

ployees performing field installation work out of Respondent's Lake Elmo, Minnesota facility in the geographic area set forth in article 4 of the contract. Respondent denies that allegation which, indeed, is an overly simplified summation of the contract's unit description.

Article 3 of the contract extends recognition to ''each of the Unions to which the Contractor has agreed to be bound, as the exclusive collective-bargaining representative of the employees in the craft signatory to this Agreement.'' Of course, Respondent is ''the Contractor'' and the Union is the only ''Union[ ]'' with whom Respondent ''has agreed to be bound[.]''

Article 4 sets forth the ''SCOPE OF AGREEMENT'' by ''limit[ing] coverage of this Agreement to the Minnesota counties listed below[.]'' The 55 counties enumerated are:

> Otter Tail, Wadena, Todd, Morrison, Mille Lacs, Kanabec, Chisago, Isanti, Benton, Stearns, Douglas, Grant, Traverse, Stevens, Pope, Big Stone, Swift, Kandiyohi, Meeker, Wright, Sherburne, Anoka, Washington, Ramsey, Hennepin, Carver, McLeod, Renville, Chippewa, Lac Qui Parle, Yellow Medicine, Lyon, Redwood, Brown, Sibley, Nicollet, Scott, Dakota, LeSueur, Rice, Goodhue, Wabasha, Winona, Olmsted, Dodge, Steele, Waseca, Blue Earth, Watonwan, Cottonwood, Faribault, Freeborn, Mower, Fillmore, Houston.

Not all Minnesota counties are covered by that list. Struss testified that the Union's ''geographic jurisdiction covers approximately two-thirds—bottom two-thirds of the State of Minnesota, some 50 counties.'' Although he continued by stating that the Union's own geographic jurisdiction encompasses also ''12 or 13 counties in western Wisconsin,'' locations outside of Minnesota are not listed in article 4. Accordingly, even though an employee works out of Respondent's Lake Elmo facility, there is no basis for concluding that the 1995–1998 contract's terms would apply to the wages, benefits, and employment terms whenever such an employee works at a bank location outside of the 44 specified Minnesota counties.

As to unit composition, as distinguished from the foregoing discussion of unit scope, Respondent did not dispute Struss' testimony that, as applied to Respondent, the contractual unit would encompass ''all of the field installation work or field assembly work''—that is, ''any of the work that's done outside the shop or manufacturing or repair is actually taking out into the field and installed.'' Consequently, the unit would encompass, as the General Counsel alleges, full-time and regular part-time employees performing field installation work. And, in light of what has been said above, the contract covers all those employees whenever performing field installation work in the 55 above-listed counties, pursuant to articles 3 and 4 of the 1995–1998 contract. Since Respondent has shown no public policy which would be neutralized or undermined by such a unit, that contractual unit is an appropriate bargaining unit within the meaning of Section 8(f) and Section 9(b) of the Act. Furthermore, during the term of that contract, the Union is the exclusive representative of all employees in that appropriate bargaining unit, pursuant to Section 8(f) of the Act.

Were this case to present no more than an issue of contractual unit, the above-described discussion would resolve that issue adverse to Respondent's position. The terms of the contract are not confined to employees whom the Union dispatches, for nothing in it so narrowly confines its application. Rather, it applies to all field installation employees whenever working within the 55-county geographic jurisdiction, without stated regard to whether they have been dispatched by the Union or, alternatively, have been hired directly by Respondent. Under the precedent set forth at the beginning of this Section, Respondent has been failing to fully honor the 1995–1998 contract, by limiting its recognition and other terms to employees dispatched from the Union's hiring hall. Yet, more is involved.

Daniel Bauer testified that Respondent has contracted with the Union since 1983, when it went into business. He further testified that he was familiar with contracts between his prior employer—Diebold, Incorporated—and the Union during years before 1983. In all instances, testified Bauer, the terms of those contracts were applied only on projects where union labor was required. At no point since 1983, he asserted, have the terms of contracts been applied to projects not requiring employees to be union. Beyond that, Bauer continued, Respondent had never applied the Union's contract terms to employees whom Respondent hired directly, as opposed to those dispatched to it by the Union. At no point, he testified, has the Union ever taken issue with that procedure for administering its contracts with Respondent.

In point of fact, none of the foregoing assertions are disputed: Respondent and the Union have been parties to several contracts prior to 1995, Respondent has applied the terms of those contracts only to employees dispatched by the Union and not to employees whom it had hired directly, and the Union never has sought to enforce its contracts with Respondent on behalf of employees whom it did not dispatch. Nevertheless, there is more involved in resolving this issue than simply the procedure which Respondent has chosen to follow in administering its collective-bargaining contracts with the Union.

To support its argument concerning past contractual procedure, Respondent might have chosen to pursue one or more of three doctrines: absence of meeting of the minds because of mistake of fact when the 1995–1998 contract was executed as to how it would be administered, Union waiver of any contractual right to apply that current contract's terms to all employees covered by the recognition provisions, and equitable estoppel. In the context of the instant case, all three doctrines can be brought into play based on Respondent's past practice contention. Respondent chose only to proceed on the basis of the equitable estoppel doctrine. Still, attention must also be paid to the other two doctrines, as well, inasmuch as one or both may later be advanced in connection with the bargaining violations.

Mistake can be mutual or unilateral. A mutual mistake occurs whenever both contracting parties have ''labor[ed] under the same misconception as to a past or existing material fact.'' *Great Western Sugar Co. v. Mrs. Alison's Cookie Co.*, 749 F.2d 516, 521 (8th Cir. 1984) (quoting from *Czarnecki v. Phillips Pipe Line Co.*, 524 S.W.2d 153, 157 (Mo.Ct.Ap. 1975)). Mutual mistake is not involved here, because there is no evidence that the Union's officials contemplated limited application of the 1995–1998 contract and its terms at the time that contract was presented to Respondent and executed by the parties.

Unilateral mistake occurs whenever parties give different meaning to a term or terms of a contract. For example, the Board adopted the following explanation of unilateral mistake in *Apache Powder Co*., 223 NLRB 191, 195 (1976):

> If the court is convinced that the two parties gave substantially different meanings to the words of a contract, and it is not convinced that either one of them knew or had reason to know what the other meant or understood by the words, then there is no reason for choosing one interpretation rather than the other and there is no contract. 3 Corbin Contracts . . . . [[Sec.] 538 at 64–65 [1960].]

Here, the argument would be that, based on practice under prior contracts, Respondent understood that, despite its breadth, the contractual recognition provisions would not be applied to all of Respondent's installation employees, but only to projects on which unionized labor was required, such as the Highland Park Bank project, and, then, only to employees dispatched from the Union's hiring hall, pursuant to the contractual hiring hall provision.

''Waiver is the intentional relinquishment of a known right.'' *Larkins v. NLRB*, 596 F.2d 240, 247 (7th Cir. 1979). Here, the rights at issue are the Union's statutory right—arising, as discussed above, under Section 8(d) of the Act and, as well, under the Federal labor policy that contracts will be honored—to recognition during the contract's term as the representative of all, not merely selected, employees covered by the unit specified in the 1995–1998 contract and, concomitantly, the statutory right of the Union and the field installation employees to application of all contractual terms to all employees covered by that contract, at least to the extent that such terms are encompassed by ''wages, hours and other terms and conditions of employment,'' within the meaning of Section 8(d) of the Act.

To establish that the Union waived those statutory rights, ''there must be a conscious relinquishment by the Union clearly intended and expressed to give up the right[s].'' *Proctor & Gamble Mfg. Co. v. NLRB*, 603 F.2d 1310, 1318 (8th Cir. 1979), and cases cited there. There is no basis for concluding that such a test has been satisfied if scrutiny of the facts is confined to articles 3 and 4 of the current contract. For, nothing is ''explicitly stated'' in those articles, nor in any of the contract's other provisions, which would supply a basis for concluding ''that the parties intended to waive,'' *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983), the Union's statutory right to represent all employees covered by the unit description and the statutory right of the Union and those employees to have the contract's terms fully honored by Respondent.

Under the Act, however, the doctrine of waiver contemplates more than mere examination of contract language. In *United Technologies Corp*., 274 NLRB 504, 507 (1985), and, again, in *American Broadcasting Co*., 290 NLRB 86, 88 (1988), the Board agreed with the proposition that, ''Waiver can occur in any of three ways: by express provision in the collective-bargaining agreement, by the conduct of the parties (including past practices, bargaining history, and action or inaction), or by a combination of the two.'' *Chesapeake & Potomac Telephone Co. v. NLRB*, 687 F.2d 633, 636 (2d Cir. 1982). As set forth above, it is to practice, as well as union inaction, under past contracts to which Respondent points in arguing that it did not violate Section 8(a)(5) and (1) of the Act by its limited application of the current contract with the Union and its terms. ''[I]t is well established that the parties' 'practice, usage and custom' is of significance in interpreting their agreement.'' (Citation omitted.) *Consolidated Rail v. Railway Labor Executives' Assn*., 491 U.S. 299, 311 (1989).

The third doctrine is the one on which Respondent relies in this proceeding to defend against the bargaining allegations: that of estoppel. ''Estoppel is an equitable doctrine invoked to avoid injustice in particular cases,'' under which ''the party claiming the estoppel must have relied on its adversary's conduct 'in such a manner as to change his position for the worse.''' *Heckler v. Community Health Services of Crawford*, 467 U.S. 51, 59 (1984) (quoting from IIIJ, Pomeroy, Equity Jurisprudence Sec. 805 at 192 (S. Symons ed. 1941)).

Under that doctrine, Respondent relies on its practice, to which the Union purportedly acquiesced, of applying past contracts and their terms only to employees dispatched by the Union and, conversely, of not having applied those contracts and their terms to employees hired directly by Respondent. Thus, it argues,

> Had [Respondent] known that [the Union] intended to enforce the 1995–1998 agreement as written, it would not and could not have entered into such an agreement without spelling its own financial ruin. Over the preceding decade, [Respondent] had come to rely on its understanding of the agreements it signed an understanding that was developed and confirmed by [the Union]'s non-enforcement of the agreements. [The Union] acquiesced to the limited payments [Respondent] made under the agreements to only those union members it hired for specific projects. In short, [the Union] is equitably estopped from seeking to enforce the 1995–1998 agreement and asserting a violation of Sections 8(a)(1) and (5) of the [Act].

In evaluating the application of each of those doctrines in a case such as the instant one, in addition to contract language, examination must be made of the facts in the following areas: circumstances in which the contract was negotiated and executed, subsequent conduct under that contract, and, of course, practice under prior similar contracts. As it turns out, examination of those areas turns out not to support Respondent's defense of estoppel. Nor does that examination provide a basis for applying either of the other doctrines as a defense to Respondent's admitted failure to fully honor its 1995–1998 contract with the Union.

With respect to the circumstances under which the contract had been executed, as described in section I, in late September Harrington and two other employees had gone to the Highland Park Bank project, but had been turned away by the assistant superintendent there. Because the latter held out the possibility that the project superintendent might allow Respondent's employees to work on the project without union cards, Janet Bauer sent Harrington and Peterson back to the project. However, the superintendent was unwilling to allow the two employees to work on the site. Only when that unwillingness was communicated to her did Janet Bauer contact the Union about signing a contract.

That sequence of events has some bearing on Daniel Bauer's credibility. For, he testified that practice had been to apply prior contracts with the Union only on projects where unionized labor was required. According to him, that had been the understanding which had emerged from Respondent's relationship with the Union prior to 1995. Daniel Bauer also acknowledged that he had been notified ''in advance'' that only ''union labor'' would be allowed to work on the Highland Park Bank project. He testified that, accordingly, ''it was our intent to call for a couple iron workers prior to going [to that project] but as busy as we were it slipped by and didn't get the call made until they were on their way.'' Yet, his professed willingness to deal in September with the Union is not consistent with the above-described actions and statements of his wife.

Daniel Bauer testified that she ''has pretty much handled the scheduling, talking to the customers, assigning the jobs to the individuals'' for the preceding 5 years. In addition, she was the co-owner who contacted the Union, after Respondent's employees were turned away from the Highland Park Bank project. Given her role in Respondent's operations, it seems natural that she would have known of any intention ''to call for a couple iron workers prior to going'' to that project. Indeed, Daniel Bauer never claimed that his wife had not known of that supposed intention. Yet, her words and actions displayed a seeming effort to avoid having to deal with the Union.

When Harrington and the other two employees were first turned away from the Highland Park Bank project, there is no evidence that Janet Bauer made any effort to try contacting the Union, even though those employees' lack of union cards had been the very reason for their not having been allowed to work there. Instead, she sent Harrington and Peterson to ascertain if the superintendent would allow them to work there without union cards. That is certainly not the action of an employer claiming an intention ''to call for a couple of iron workers'' before beginning installation work at the project. Once those three employees had been turned away from the project, and had been turned away because they lacked union cards, it can hardly be asserted that a professed intention to contact the Union had continued to ''slip[ ] by.''

Not only did Janet Bauer send Harrington and Peterson to the project, to ascertain if the superintendent would permit them to work there without union cards. Both employees described her as having complained, before they were sent to the site, that had the three employees first sent there been better dressed, no one would have suspected that they were nonunion and asked for their union cards. Those are hardly the words of an employer who had intended to contact the Union ''for a couple of iron workers prior to going'' to the Highland Park Bank project. In the foregoing circumstances, Daniel Bauer's professed willingness to contact the Union, in connection with that project, tends to be contradicted by his wife's actions and words in connection with the Highland Park Bank project.

When Janet Bauer eventually did telephone the Union, she spoke with Struss. She explained that Respondent's employees would be denied access to the Highland Park Bank site because they were nonunion. She asked about signing a contract and getting temporary work permits for Respondent's employees. Struss explained that, ''because of the availability of people at the time'' in the hiring hall, the Union would be willing to issue permits to her employees, but that it would do so only if she signed a collective-bargaining contract.[6] Bauer seemed to understand as much, given her question about signing a contract. Respondent never contended that it had not understood that the Union would not issue temporary work permits absent execution of a collective-bargaining contract.

During their conversation, Struss asked if Janet Bauer ever had signed a contract. She replied that she had done so and had received work permits in the past from the Union. He reviewed the wages and benefits of the current contract. He testified that ''she mentioned the fact that she may have 2 or 3 additional projects coming up where she would be required to have union employees on the job. That's why she was concerned about signing a contract.'' However, there is no evidence that she had said anything about confining application of the contract and its terms only to those projects and not to other installation projects on which Respondent would be working. Nor is there evidence that Janet Bauer had said anything to Struss about confining the contract's terms only to some employees—those dispatched by the Union—who worked on those projects.

Struss told Janet Bauer that he would have someone bring the contract to her for signature and he instructed her to send the two employees to the Union's hall to pick up the permits. He asked Business Agent Richard Frahm to take copies of the 1995–1998 contract to Respondent for signature. Frahm telephoned Janet Bauer to ascertain if she would be present when he arrived at Respondent with the contract. She responded that she would be there. When he arrived at Respondent's Lake Elmo facility, however, a secretary told Frahm that Janet Bauer ''had to leave.'' He left two copies of the contract, as well as a fringe benefit funds report form and a document setting forth the terms of the wages and fringe benefits under the current contract.

During the following day, Frahm telephoned Janet Bauer who said that she would be in when he planned to arrive at Respondent later that same day. She was and when she ushered Frahm into her office, he testified, ''She had the contract partially filled out'' on the signature page. She asked if she could backdate it to September 27 and, after reflecting as to whether that would be proper, Frahm consented.

Frahm denied that Janet Bauer had mentioned, or asked any questions about, a project agreement.[7] He also denied that she had asked for special contract terms or circumstances. There is no evidence showing that there had

[6] The Union's officials testified that the Union issues temporary work permits only to employees of employers who are parties to contracts with it.

[7] An agreement limited to a particular project or to particular projects. Other unions have signed such agreements. For example, Respondent signed a project agreement during 1983 with U.A. Pipefitters Union, Local #455. That was a single-page document entitled ''*PROJECT AGREEMENT*'' which identifies expressly ''a project at the NORWEST BANK, DRIVE-IN located at Pilot-Knob Road and Yankee Doodle Road in Eagan, Minnesota.'' There is an obvious difference, apparent from their appearances, between that agreement and the current contract which Janet Bauer executed for Frahm. The Union's officials testified that the Union never signs project agreements, save in a one situation discussed below and not applicable here, and does not apply its standard collective-bargaining contract, such as Janet Bauer signed in 1995, on a project basis.

been discussion with either Frahm or Struss about limiting the contract to only some of Respondent's projects within the 55 counties area, nor to only selected employees who worked on those projects.

There is a common factor which arises under each of the three above-discussed doctrines. That is knowledge or, at least, notice based upon facts which suffice to alert a contracting party of a belief harbored by the other which is at odds with the stated contract terms. As might be expected, there are, of course, differences as to how that factor applies under each of those doctrines.

''The law is well settled that a contracting party may not escape its contractual responsibilities by claiming that it was unilaterally mistaken'' (citation omitted), and the vital matter exception to that rule applies only ''[w]here the mistake of one party is either known to the other party or is so obvious, under the circumstances, that it must have been known'' to the other contracting party. *Great Western Sugar Co. v. Mrs. Alison's Cookie Co*., supra, quoting from *Frederich v. Union Electric Light & Power Co*., 336 Mo. 1038, 82 S.W.2d 79, 86 (1935); *Saline County v. Thorp*, 337 Mo. 1140, 88 S.W.2d 183, 185 (1935). As set forth above, for a waiver to be found, it must be shown that there has been ''a conscious relinquishment,'' in the context of a case such as the instant one, of a contractual right. *Proctor & Gamble Mfg. Co. v. NLRB*, supra. Obviously, there cannot be a conclusion of such relinquishment absent evidence of knowledge by the purportedly relinquishing party of the other party's intention to administer a contract's terms other than as written. Similarly, as also set forth above, the doctrine of estoppel requires that there be some element of knowledge or, at least, constructive knowledge such that it can be concluded that the party against whom estoppel is asserted had reason to believe that the other party would rely upon the estopped party's conduct. *Heckler v. Community Health Services*, supra.

Nothing in the above-described sequence of events, leading to her execution of the current contract, establishes that either Struss or Frahm actually knew or reasonably could have known, that Janet Bauer, in particular, or Respondent, in general, contemplated limiting recognition of the Union and application of the 1995–1998 contract's terms only to particular projects within the 55 enumerated Minnesota counties area and, then, only to certain employees—those dispatched by the Union—working on such projects. To be sure, Janet Bauer did tell Struss that she needed work permits for Respondent's employees to work on the Highland Park Bank project and that Respondent might ''have 2 or 3 additional projects coming up'' where ''union employees'' would be required. Yet, in context, such statements cannot be said to have appeared other than merely conversational or, at best, informational. Standing alone, her statements do not rise to a level which would establish that the Union's officials actually knew or were put on notice, by what Bauer said, that Respondent intended to apply the contract only to those projects and to union-dispatched employees working on them.

At no point did Janet Bauer expressly state such an intention to either Struss or Frahm. Objectively viewed, nothing which she had said to those two union officials would have put either one on notice that Respondent did not intend to fully comply with the contract's terms, as written. In consequence, there is no basis for concluding that Struss, Frahm, or any other official of the Union knew or should have known, at the time of the contract's execution, that Respondent contemplated applying its recognition provisions and its terms only to certain employees working on a limited number of projects in the 55 Minnesota counties.

The contract had been left overnight at Respondent by Frahm. Accordingly, by the time that he returned on the following day, its co-owners had seemingly had ample time to read it. During Frahm's second visit, Janet Bauer had ample opportunity to ask questions about application of the contract's recognition provisions and about application of its terms to Respondent's installers. ''A party . . . knowing the facts, or in a position to know them, cannot claim the benefit of estoppel.'' *Joyce v. Gentsch*, 141 F.2d 891, 897 (6th Cir. 1944). ''[O]ne who executes a contract cannot avoid it on the ground that he did not read it or supposed it to be different in its terms.'' (Authority omitted.) *N&D Fashions v. DHJ Industries*, 548 F.2d 722, 727 (8th Cir. 1977).

It should not be overlooked that, when ushered into Janet Bauer's office, Frahm had observed that she already had filled out part of the contract's signature page. That was some indication to him that she had read the contract. Conversely, there are no facts from which it can be concluded that Frahm, on that occasion, or Struss, during the telephone conversation when Janet Bauer answered that she had signed prior contracts with the Union, could have realized that Respondent intended to apply the contract only to a limited number of employees on a limited number of projects arising in the 55 contractually specified Minnesota counties. Absent such evidence, there is no basis for concluding that the Union is somehow estopped from proceeding against Respondent because of its noncompliance with the stated terms of the 1995–1998 contract. Nor can it be concluded that, based on the facts known to Struss and Frahm when the contract was executed, the Union consciously relinquished its right to full compliance with the contract.

In sum, the recognition provisions of the 1995–1998 contract are all-encompassing; they contain no exclusions or limitations in the scope of recognition and application which they spell out. Janet Bauer had the opportunity to examine that contract before she signed it. There is no evidence that she had not done so. There is no evidence that anything said in connection with the contract could have led her to believe that the Union would relinquish any term stated in that contract. Furthermore, nothing said by her and nothing occurring in connection with her execution of the contract can be said to have put Struss or Frahm on notice that Respondent did not understand that it had to comply fully with the contract's recognition provisions and other terms. Therefore, there is no basis for concluding that the circumstances under which the contract was executed support Respondent's defense that it has not violated the Act by its limited application of the 1995–1998 contract.

Turning to the area of conduct subsequent to execution of the 1995–1998 contract, it cannot be concluded that the evidence supports a conclusion that the Union's conduct demonstrates that it had understood that the contract would be applied to only some employees working on only some of Respondent's projects. When Harrington and Peterson had gone to the Union's hall to obtain their permits for the Highland Park Bank project, Struss, and perhaps also Frahm, had explained that those two employees—neither of whom was

being dispatched by the Union—would be enjoying wages, benefits, and other terms set forth in the Union's contract with Respondent.

To be sure, nothing was said to Harrington and Peterson about future projects. Nonetheless, there was no reason to address the subject of future projects, especially as Respondent's employees ordinarily worked in areas of Minnesota and in other States not covered by the contract's unit scope. Certainly, a conclusion of limited recognition and contract application, contrary to a contract's expressed terms, cannot be based on mere failure to specifically mention future projects.

In any event, any such inference is dispelled by what occurred when Harrington did not receive contractually specified wages and benefits after having received his work permit. He contacted the Union, reported that he was not receiving those wages, and was told to begin photocopying his pay stubs and to send those copies to the Union. Obviously, had the Union agreed that the contract's terms would apply only to employees whom it dispatched to Respondent, it is not likely that it would have asked Harrington to take those actions.

In late October, overlapping into November, Respondent's employees were assigned to work on a project at National City Bank in Hennepin County. There is no contention by Respondent that it had notified the Union about that project. Organizer and Market Recovery Director Charles E. Witt testified that Harrington had been one of several people who reported that Respondent's employees were working there.

Business Agent Wilfred Anderson went to that site. Discovering several of Respondent's employees working there, he telephoned Janet Bauer and, Anderson testified, ''asked her what we could do to resolve getting the iron workers [from the Union's hiring hall] on the project and she said I would have to talk to her husband,'' who then was ''tied up in a meeting.'' Anderson left his telephone number and, as the day passed without response, made another effort later that same day to speak by telephone with Daniel Bauer. But, the latter was not available and did not return Anderson's calls.

Next morning, Anderson placed another telephone call to Daniel Bauer. This time Bauer did speak with Anderson. According to his undisputed testimony, during their ensuing conversation, Anderson said, ''That we were under contract and, of course, I'm interested in getting our iron workers to work on the project'' at National City Bank. Bauer requested work permits for Respondent's six employees already working there. Anderson testified, without contradiction, that he had responded that the Union ''according to the contract—is a first source of referral for men for iron workers,'' although the Union was willing to ''accommodate'' Respondent by issuing a temporary work permit for its supervisor or foreman on the project. At no point, so far as the evidence shows, did Daniel Bauer dispute the applicability of the contract to the project, nor did he claim that Respondent was not obligated under it to secure employees from the Union's hiring hall to work on that project. Beyond that, the Union's conduct, on discovering Respondent's installers working within the contract's stated jurisdiction, was consistent with the General Counsel's position that the Union intended its contract to be applied as written.

As it turned out, after he wrote up the job order, Anderson was able to locate but two employees who were willing to accept dispatch to Respondent's National City Bank project. So, he notified Daniel Bauer of that fact and agreed to issue work permits for four of Respondent's employees. Of course, as described above, that procedure is consistent with the contract's hiring hall article.

In arguing that the Union understood that its 1995–1998 contract had only limited application—or, at least, led Respondent to understand as much—Respondent points to the paucity of evidence showing that the Union had made efforts to enforce the contract's union-security provision. Article 5 of the contract provides, inter alia, that employees in the unit ''shall, on the eighth (8th) day following the beginning of employment in such collective bargaining unit by the Employer'' become union members. Of course, as described in section I, supra, it does not ordinarily take 8 days for Respondent to complete installation work on any particular project. Respondent has provided no evidence of any single project on which its installation employees had worked for more than 6 consecutive days. And after completing work on one project, those employees likely would be sent, given the locations of most of Respondent's projects, to a site outside of the geographic area specified in that contract.

It appears that while issuing work permits at the National City Bank project, Anderson did speak to the employees about joining the Union. Asked about such conversations, lead installer Haehn waffled, testifying, ''I don't think he did,'' and ''Whether he asked me a question about signing something else [other than the work permit] or not I'm not sure if he did or didn't ask that question.'' Ultimately, Haehn conceded, ''I mean I think Willy [Anderson] sort of talked up the [U]nion to me for just a minute or so, saying, you know, you guys really could be union or should be and so on in a very general way, but he never specifically asked me to join the [U]nion or there was any discussion about me joining the [U]nion.'' In the final analysis, aside from confirming the unreliable appearance created when he testified, that testimony by Haehn shows that the Union did make some effort—albeit, a relatively hapless one—to persuade Respondent's personnel to join the Union or, at least, to designate it as their bargaining representative.

The two referrals to Respondent's National City Bank project—Robert J. Dorrain and Richard P. Albrecht—complained to the Union, when they were laid off on completion of that project, that they had not been compensated fully under the contract. That complaint precipitated a telephone call after November 17 from Struss to Janet Bauer. He inquired first about the lack of full payment to Dorrain and Albrecht.

After that subject had been covered, testified Struss, he asked, ''[W]hy she was not paying the people that she had on temporary work permit under the terms and conditions of the agreement.'' She asked why Struss was inquiring about them. He testified, ''I said because the agreement applies to all of your employees, not just the employees that you hire from'' the Union's hiring hall. Bauer retorted, ''[T]hat will force me to close my doors and lay everybody off and go out of business.'' Struss suggested that a meeting between them be convened, ''because we definitely have a difference of opinion here[.]'' So far as the evidence discloses, this had been the first express indication to the Union that Respondent did not believe that it had to comply fully with its collective-bargaining contracts with the Union.

A meeting was conducted on December 7. At it, Struss insisted on full compliance with the contract for all field installation employees. Janet Bauer repeated her position that doing so would force Respondent to close, since it could not afford to compensate all its employees at contract levels. Struss testified, ''I said why would you think that we would sign a contract with you and then not ask you to pay under the terms and conditions of that agreement? She said well I've never done that[.]'' So far as the record shows, that had been the very first occasion when Respondent had informed the Union of that fact.

Struss denied that Janet Bauer had appeared surprised that Respondent was supposed to be paying pursuant to the contract for all of its employees. He acknowledged that she had appeared ''upset'' and, in fact, the meeting adjourned with his suggestion that she seek advice from AGC or counsel. However, he testified that her surprise had seemed based more on the fact that ''I was there to enforce the'' contract, than on the fact that Respondent was obliged to honor the contract. Significantly, neither by her above-quoted statements to Struss, nor in any other manner during that conversation or on any other occasion, did Janet Bauer assert that the Union had agreed or should have known that Respondent would not be following the contract's terms with respect to all of its employees.

At best, the foregoing postexecution events show no more than that the Union has not been as diligent as it might have been in policing its 1995–1998 contract with Respondent. Still, lack of such diligence, of itself, does not serve to establish a valid defense under any of the three doctrines discussed above, at least not in the circumstances presented here, where there is no evidence that the Union had known what Janet Bauer was thinking about administration of that contract. In such a situation, it cannot be concluded that the Union had been, or was, acquiescing in whatever responsibility Respondent felt that it had to honor the contract's terms. Indeed, at no point did Daniel Bauer testify expressly that the Union's manner of policing the 1995–1998 contract had led him to conclude that the Union understood that its terms were not to be honored fully.

Given the relatively brief ordinary duration of Respondent's installation projects, this case does not present a situation where an employer's employees would be working at a particular site for a sufficiently long period that it can be said a union likely would have discovered their presence at a location covered by its contract with their employer. Moreover, when the Union did discover that Respondent's employees were working at National City Bank, it did act promptly to assert its contract rights there. Conversely, there is no evidence of any project in the 55 Minnesota counties on which Respondent's employees worked with the Union's knowledge, but without effort by it to enforce its contract.

Beyond that, there is ample basis for concluding that Respondent had been affirmatively attempting to avoid having to deal with the Union. Though Daniel Bauer testified that he had been aware that the Highland Park Bank project was ''union'' and claimed that he had intended to ''call for a couple iron workers,'' as discussed above, he never did so and his wife appeared to have been attempting to avoid doing so. There is no evidence that, after having executed the 1995–1998 contract, Respondent ever contacted the Union to inform it about any installation project on which Respondent's employees would be working in the 55-county area. But, it is clear that at least one such project—the one at National City Bank—did exist after Janet Bauer's execution of that contract.

Furthermore, when the Union did protest Respondent's failure to apply the contract's recognition and hiring hall provisions to all field installation employees, Janet Bauer never claimed that Respondent was not contractually obligated to do so. Rather, she asserted that doing so would be too expensive and would force Respondent to close. Discussed in the succeeding section are other statements made by the Bauers, some unlawful, which also demonstrate Respondent's antipathy toward abiding fully with the current contract's terms, because of their cost. Consequently, there is ample basis for a conclusion that Respondent, itself, had been trying to avoid application of those terms to all employees working on all projects in the geographic area covered by the contract. In such circumstances, Respondent is in a poor position to argue estoppel against the Union for any lack of diligence by the latter in policing its contracts. Respondent's own seeming lack of good faith and clean hands undermines its plea that equity be extended to it.

As to the related doctrine of waiver, clearly statements or conduct in connection with the current contract cannot be said to satisfy the ''clear and unmistakable'' standard which must be met for a valid waiver defense. *Metropolitan Edison Co. v. NLRB*, supra. At no point did the Union's officials ever state that, despite the breadth of its recognition provisions, the contract could be applied only to employees whom the Union dispatched to Respondent. True, it took approximately a month for the Union to pursue Harrington's initial report about Respondent's failure to compensate him according to the contract's terms. Still, a month's delay can hardly be held to constitute ''clear and unmistakable'' conduct which establishes existence of waiver.

The meaningful facts are that the Union eventually did attempt to enforce that contract in its entirety: by telephoning Janet Bauer and then meeting with her to protest Respondent's failure to comply fully with the contract, by trying to correspond with her to secure that compliance and, ultimately, by filing the unfair labor practice charge which has led to this proceeding. In these circumstances, no basis exists for concluding that the Union's conduct in connection with enforcement of the 1995–1998 contract constitutes a basis for finding that a waiver has occurred.

There is one area which must not be overlooked before departing from the subject of events following execution of the current contract. It does appear that Janet Bauer expressed surprise when told that the Union expected her to apply the contract to all employees working on all projects within the 55-county area. That expression of surprise could be construed as some evidence that she had signed the contract under a mistaken belief that Respondent would need to honor it only for employees dispatched by the Union. However, as there is no evidence that the Struss or Frahm had known of her belief, or was on notice that Janet Bauer might have believed as much, there is no basis for applying the exception to the doctrine of unilateral mistake to invalidate Respondent's statutory duty to honor the contract.

Finally, in the area of duty to fully honor its contract with the Union, Respondent argues that, under the historic relationship between them, the parties had established a practice

of limited application of their contracts' terms. At the outset of considering such an argument, it must be pointed out that the Board has held that a union's past acquiescence to an employer's failure to honor contract terms does not, under Section 8(d) of the Act, operate to obliterate an employer's statutory obligation not to terminate or modify contract terms during the existence of a collective-bargaining contract, save under conditions enumerated in that section of the Act. See *Owens-Brockway Plastic Products*, 311 NLRB 519, 526 (1993); *Edgar P. Benjamin Health Care Center*, 322 NLRB 750, 753 (1996). Moreover, there is no basis for establishing that even acquiescence has occurred over the course of the bargaining relationship in the instant case. For, Respondent has failed to present evidence sufficient to show that prior to late 1995 the Union had been aware of Respondent's limited application and administration of contracts between the parties.

At no point did Respondent present evidence of a specific instance where the Union had known that contractual wages and benefits were not being followed with respect to particular employees working on a site within the jurisdiction of the parties' prior contracts. Apparently realizing that it lacked such evidence, Respondent followed two other courses. First, it has tried to show that the Union should have known what Respondent was doing and, if it did not, that was because the Union had been unconcerned with policing its contracts.

To be sure, it does appear that the Union was no more diligent in policing past contracts than, as discussed above, it has been in policing the current one. Nonetheless, Respondent's argument bears a remarkable similarity to that advanced by a motorist ticketed for running a stop sign who, in defense, argues that he always ran that stop sign and, because of failure to constantly station an officer there, a practice had arisen which entitled him lawfully to continue doing so—that the state had waived any right to ticket him or, alternatively, is estopped from punishing him for disregarding the sign. Such an argument would not have validity. Neither should the similar one advanced by Respondent in the first course which it has chosen.

Market Recovery Director Witt testified that, ''Generally when [employers] sign [a contract] we don't have a problem.'' In other words, the Union assumes that signatory contractors will honor the terms of contracts to which they become parties. There is nothing illogical about such an assumption.

Business Manager Struss testified that, since 1984, he had been unaware of any concern about Respondent honoring its contracts with the Union. The Union's officials testified that they have made an effort to police work being performed within the Union's jurisdiction, through examination of trust fund contribution records, particularly reports made to the vacation fund, and through followup on reports made by members and others. Still, Witt pointed out, by the time that Respondent's employees come onto a site, ''almost all of the iron workers are gone since basically a lot of our work is in the structural steel and by the time that that's done—by the time that the vaults or whatever are going to be installed, our guys are long gone.'' Of course, as pointed out above, Respondent's installation work is of relatively brief duration, with the result that, as a practical matter, the Union would seemingly have but a limited window of opportunity to discover that Respondent's employees were installing a particular project's vaults, automated teller machines, night depositories, and/or driveup lane equipment.

Nevertheless, the record does disclose that the Union sometimes had been successful in catching Respondent performing installation work at sites located within a contract's jurisdiction. Lead installer Haehn conceded that, while working for Respondent since 1983, there had been occasions where

> you go out to start a job and, you know, a business agent would come along and ask who we were, what were we doing I mean as far as what our work was, and if we had, you know, any union trade cards, trade business—basically asking if we were union, if we had any cards to show him and we would not, and at that point it would always come down to a matter of referring the business agent to [Respondent's] office.

That testimony shows that there had been policing of work being performed in its jurisdiction by the Union.

Respondent points to the fact that the Union had not always promptly brought a newly negotiated contract with AGC to Respondent for the latter's signature and, further, never appeared to be enforcing union-security clauses in those contracts. But, a union-security requirement can be satisfied by employees' direct payment of dues and fees to a union. Checkoff is not obligatory. ''Checkoff is a means by which employees *voluntarily* assign a portion of their wages to a union in order to pay their dues and other obligations to the union.'' (Emphasis added.) *Frito-Lay*, 243 NLRB 137 (1979). Accordingly, the absence of dues collection through checkoff hardly serves as evidence, from an employer's perspective, that a union is not enforcing its contract. Obviously, if employees were satisfying their dues obligation by direct payment, there would be no occasion for a union to seek the discharge of any of them. Respondent has presented no evidence of knowledge by either Bauer that the Union had not been collecting dues directly from its employees.

Nor does Respondent's position gain force from an argument about delay in submitting contracts for it to execute. Daniel Bauer testified that ''the majority of'' Respondent's installation work ''would probably be outstate Minnesota into Wisconsin,'' and that ''maybe 90 percent is outside the metro area.'' In fact, Respondent has not shown that it has performed installation work with any regularity in the 55 counties listed in its current contract with the Union. In such circumstances, it would not be surprising that the Union did not pursue Respondent to execute successive contracts whenever existing ones expired. Viewed from the Union's perspective, it could not be concluded with any certainty that Respondent would be making any installations within any of those counties during the term of any one of those contracts. So, the fact that the Union may have chosen to wait until it learned that Respondent was doing so, to approach Respondent with a new contract, does not supply a basis for Respondent to conclude that the Union was indifferent to whether or not Respondent observed the terms of its contracts covering such work. Certainly, such delays afford no basis for Respondent to conclude that it could pick and choose to which employees on which projects it could apply the terms of its contracts.

In sum, while Respondent had been choosing prior to 1995 to apply its contracts with the Union only to employees dispatched by the Union, the evidence does not support a conclusion that the Union had endorsed, or even been aware of, such limited application of its contracts with Respondent. In consequence, Respondent's past conduct cannot be said to form a basis for invalidating the stated scope of the 1995–1998 contract under any of the three doctrines discussed above.

The second avenue along which Respondent attempts to travel, to establish a shared understanding of limited contract application, is based on Daniel Bauer's efforts to attribute specific statements to retired Business Manager John M. Sheehan which, argues Respondent, show that Sheehan had understood and endorsed limited application of the Union's contracts with Respondent. Sheehan had occupied the position of the Union's business agent from mid-1975 until he had become its business manager during 1984. He was succeeded by Struss on retirement on February 1, 1994.

Daniel Bauer testified that both while had worked for Diebold prior to 1983, and after he had formed Respondent during that year, the practice had been to apply the Union's contract only to projects on which union labor was required. Both Diebold and Respondent, testified Bauer, had contracts with the Pipefitters Union which were merely project agreements. When he asked Sheehan why there could not also be like agreements with the Union, Bauer testified, ''His response always was that we only have one form and we use it for different reasons.'' No other response by Sheehan was described by Bauer. The foregoing response, which Bauer did describe, is argued by Respondent to constitute an agreement by Sheehan that agreements with the Union could be imposed on a project basis. However, Sheehan's words, as described by Daniel Bauer, hardly support such an argument.

Those words, even if spoken, hardly demonstrate a clear and unmistakable relinquishment of the Union's contractual right to have Respondent abide fully by their contracts' terms. From their face, the words attributed to Sheehan are ambiguous. They appear to have amounted to nothing more, if said, than an effort to put off Bauer's question. Sheehan credibly denied that he ever had any conversations with Daniel Bauer in which there had been reference to a possibility of the Union's contract being treated as a project agreement: ''I might have talked to him in '83 or '84 but I would not have talked to him about any deviation in the contract.''

Bauer also testified that he ''had a couple conversations'' during which Sheehan asked, ''[W]hy don't we put our people in the [U]nion and my comment was that we work in several different trades. They would need several cards[.]'' But, such an exchange hardly shows that Sheehan was aware, much less in agreement, that Respondent did not have to apply contract terms to those employees. Respondent's contracts with the Union were ones validated under the Act by Section 8(f). The exchanges described by Bauer appear to have been an effort to explore the possibility of changing that relationship to one covered by Section 9(a) of the Act. In any event, the questions described by Daniel Bauer do not suffice as a conscious, clear, and unmistakable relinquishment of the Union and employees' rights to have contracts honored for all employees covered by their recognition provisions.

It should be pointed out that the Union has become party to a limited number of project agreements. That has occurred, however, as a result of its bargaining relationship with AGC on behalf of employers represented by that seemingly multiemployer bargaining agent. Respondent has never contended that it had been aware of those contracts. In contrast, it has been aware of what project agreements look like. As pointed out above, it has been party to project agreements with Pipefitters and, also, with a Wisconsin sister-local of the Union. The Union's officials testified that, aside from the project agreements negotiated through AGC, it never becomes a party to a project agreement and Respondent has not presented any evidence contradicting that testimony.

Therefore, Respondent has failed to present credible evidence to support a conclusion that the Union should be estopped from claiming a statutory right to full enforcement of its contract with Respondent. Neither has Respondent presented evidence sufficient to establish waiver nor unilateral mistake which would be countenanced as a basis for concluding that there had not been a meeting of the minds when Janet Bauer executed the 1995–1998 contract with the Union.

In fact, what appears to be shown by this record is that Respondent never wanted to pay wages and benefits required by the Union's contracts, but did want to work on projects within the Union's contractual jurisdiction. So, the Bauers chiseled. When approached by the Union, they signed successive collective-bargaining contracts with it, but chose to comply with those contracts only with regard to employees whom the Union could identify as working on Respondent's projects within the unit scope set forth in those contracts—that is, those employees whom the Union dispatched and, thus, knew were working for Respondent on projects to which their contracts applied.

During the term of a contract executed under Section 8(f) of the Act, all parties are obliged to maintain their bargaining relationship and to continue honoring the contract's terms. *John Deklewa & Sons*, supra. Respondent has not done that during the terms of its current contract with the Union. Therefore, it has violated Section 8(a)(5) and (1) and Section 8(f) of the Act. Moreover, its nonresponses to the Union's requests for a meeting, made in the letters of December 26 and January 17, 1996, are tantamount to a refusal to continue bargaining with the Union during the term of that contract, a further violation of Section 8(a)(5) and (1) of the Act. Taken together, Respondent's conduct warrants a conclusion that it has repudiated the current contract and has withdrawn recognition from the Union in further violation of Section 8(a)(5) and (1) and Section 8(f) of the Act.

As to Respondent's failure to provide the information requested in those letters, ''information about employees actually represented by a union is presumptively relevant and necessary and is required to be produced.'' *T.U. Electric*, 306 NLRB 654, 656 (1992). Thus, Respondent violated Section 8(a)(5) and (1) of the Act by failing to supply the payroll record information described in the Union's December 26 letter, with one exception.

The Board has concluded that employees' social security numbers are not presumptively relevant. *Sea-Jet Trucking Corp*., 304 NLRB 67 (1991). Their relevancy must be shown as, for example, where the parties' contract provides for their production. *MBC Headwear, Inc*., 315 NLRB 424 fn. 2 (1994). But, article 19 of Respondent's contract with the

Union, on which its request for payroll record information is based, makes no mention of social security numbers. Nor are they mentioned elsewhere in that contract. In its letters the Union advanced no explanation for requesting social security numbers. No showing of relevance and necessity for social security numbers has been made by the General Counsel. None is suggested by the record. Therefore, I shall dismiss the information allegation insofar as it encompasses social security numbers.

Independent of the contract's article 19, the Union has requested ''a list of all jobs performed by [Respondent] in the past two years, as of December 26, 1995.'' In neither of its letters did the Union express a basis for that request. Still, Respondent concedes that it has not been recognizing the Union as the bargaining agent for all employees working on projects in the 55 contractually specified Minnesota counties. And it also admits that it has not been honoring the terms of its contracts for all employees who have worked on Respondent's projects within those counties.

Both the current contract and the one for 1992–1995 include ''Settlement of Disputes'' provisions. They provide that grievances may be filed and arbitration conducted concerning ''Any controversy over the . . . adherence to the terms of this Agreement.'' Given Respondent's admitted failure to apply contractual recognition and employment terms to all employees working on all projects in the 55-counties area, the purpose for the Union's requests for a list of jobs is evident and, moreover, had to be obvious to Respondent when it received those requests. In fact, Respondent has not contended that it did not understand the purpose for the Union's requests for the list of jobs—did not contend that it did not understand that the list was being sought so that the Union would be able to ascertain the extent of Respondent's lack of ''adherence to the terms of'' its contracts.

''It has long been settled that an employer who refuses to provide relevant and necessary information that allows a union to decide[ ] whether to process a grievance violates Section 8(a)(5).'' (Footnote omitted.) *Safeway Stores*, 268 NLRB 284, 285 (1983). Such information is relevant and necessary for bargaining agents to police and enforce their collective-bargaining contracts. It makes no difference whether a grievance actually has been filed by the time of an information request or, as here, grievance-filing is only being contemplated. *W-L Molding Co*., 272 NLRB 1239, 1240 fn. 6 (1984), and cases cited therein. At both stages, ''the desired information . . . would be of use to the union in carrying out its statutory duties and responsibilities.'' *NLRB v. Acme Industrial Co*., 385 U.S. 432, 437 (1967).

By the time of its December 26 letter, the Union had learned that Respondent had not been applying the 1995–1998 contract to all employees working on projects located within the 55 Minnesota counties to which the contract applied. From Janet Bauer's telephone and meeting remarks, the Union also learned that Respondent likely had not be doing so under prior contracts between the parties. Only a list of Respondent's jobs would reveal the extent of Respondent's failure to fully honor the current and preceding collective-bargaining contracts.

In these circumstances, a list of jobs is relevant and necessary for the Union to carry out its duties and responsibilities of representing employees who have worked on Respondent's projects located in those 55 Minnesota counties. See, e.g., *AGA Gas*, 307 NLRB 1327, 1329–1330 (1992); *Custom Excavating, Inc*., 228 NLRB 285, 287–288 (1977), enfd. as modified in other respects 575 F.2d 102 (7th Cir. 1978).

That conclusion is not subject to change or modification merely because Respondent's contracts with the Union are validated by Section 8(f) of the Act. The statutory duty to provide information ''is equally applicable during the term of an 8(f) agreement.'' (Citation omitted.) *Audio Engineering*, 302 NLRB 942, 943 (1991). Respondent has advanced no contention, nor evidence to support one, that the information about jobs is confidential. Nor has it contended or shown that production of that information would be burdensome. Nonetheless, two other considerations are suggested by the request for ''a list of all jobs performed by'' Respondent. First, the current contract did not become effective until September 27, the date to which Janet Bauer requested and obtained permission to make it effective. Thus, the Union's ''past two years, as of December 26, 1995'' request seeks information for a period prior to the effective date of the current contract. Of itself, however, that request is not over-inclusive, save in one respect.

The Board has held ''that the mere expiration of the 8(f) agreement does not toll the Union's right to verify the Respondent's compliance with that agreement during its term.'' Id. at 944. Respondent had been party to a 1992–1995 contract with the Union. Under article 11 of that earlier contract, a grievance need only be ''submitted in writing within the ten (10) working days after first occurrence of the event *or knowledge of the condition giving rise to the grievance*.'' (Emphasis added.) As concluded above, the evidence does not show that prior to November the Union had possessed knowledge of Respondent's limited compliance with its contract obligations. Moreover, there is no evidence showing any limitation on filing a grievance under the 1992–1995 contract if ''knowledge'' of noncompliance is not acquired until after that contract's stated term. Consequently, so far as the evidence discloses, the Union ''may still file a grievance and seek redress over,'' Id., Respondent's failure to honor the 1992–1995 contract. In those circumstances, the fact that the Union seeks information about jobs for a period prior to the effective date of the current contract does not invalidate that request under the Act, *Oliver Insulating Co*., 309 NLRB 725, 726 (1992), inasmuch as the request encompasses a period during which the preceding contract had been in effect.

Still, Respondent's contracts with the Union arise under Section 8(f) of the Act and, in consequence, its statutory bargaining obligation to the Union exists only so long as it is, and has been, a party to such contracts. The 1992–1995 contract expired by its terms on April 30. Respondent did not again become party to a contract with the Union until the current contract became effective on September 27. Accordingly, Respondent owed no bargaining obligation to the Union from May 1 through September 26. ''The duty to supply requested information arises from a statutory bargaining obligation.'' (Citation omitted.) *Howell Insulation Co*., 311 NLRB 1355, 1356 (1993). In consequence, as that case holds, Respondent is not obliged to furnish information to the Union about jobs on which Respondent's installers had worked from May 1 through September 26.

The second consideration is the geographic scope of the job list requested by the Union. The current contract and the

preceding one encompassed only the 55 Minnesota counties listed above. Most of Respondent's jobs are located outside of those counties. Neither the Union, in its correspondence with Respondent, nor the General Counsel, during this proceeding, has shown a need for the Union to possess a list of jobs which have been performed by Respondent's employees on sites located outside of the contracts' geographic area. No such need is suggested by the record. Consequently, there is no basis for concluding that Respondent has violated the Act by failing to provide a list of jobs performed at locations other than within those 55 Minnesota counties.

Therefore, I conclude that Respondent did violate Section 8(a)(5) and (1) and Section 8(f) of the Act by failing to provide payroll-record information as described by the Union in its letter dated December 26, 1995, save social security numbers and, in addition, by failing to supply the Union with a list of all jobs performed by Respondent in the 55 contractually enumerated Minnesota counties during the 2-year period ending on December 26, 1995, but excluding jobs performed between May 1 and September 26, 1995.

III. THE DISCHARGE OF SCOTT HARRINGTON

There can be little question about the adequacy of the General Counsel's threshold showing that Respondent's November 15 discharge of Scott Harrington had been unlawfully motivated under the Act. As mentioned in section I, supra, after two interviews with Daniel Bauer, Harrington began working for Respondent during June. Over the course of the following 4-1/2 months, he engaged in two types of activity protected by the Act. Both are relied on by the General Counsel in arguing that Respondent harbored animus toward Harrington and discharged him on the basis of that animus.

First, the General Counsel points to Harrington's involvement in incidents concerning terms and conditions of employment, though the dates, and even dates of incidents in relation to each other, are not always clear from the record. For example, because he possessed a class A commercial driver's license, Harrington was assigned in mid-August to drive Respondent's trucks to projects. When he noticed that one truck, at least, lacked a logbook and daily inspection sheets, required by the United States Department of Transportation, he testified, without contradiction, ''I brought it to Dan's attention,'' but while Bauer promised to ''take care of it,'' he never did so.

On a subsequent occasion—probably before the end of September, since Harrington testified that it had occurred before the Highland Park Bank project, discussed in section II, supra—Harrington and Peterson had been assigned to work on a project in Maple Grove. When Harrington noticed that the trailer had no license plate, he reported that fact to Daniel Bauer who, Harrington testified without dispute, said to have mechanic ''Tim Lynch take a license plate off another trailer in the lot and have him put it on'' the trailer going to Maple Grove. But when he followed Bauer's direction, Harrington was warned that the license plate would ''stick out like a sore thumb'' on that trailer because the plate was color-coded for a weight not consistent with that trailer. Harrington testified, without contradiction, that when he returned to Bauer and reported that warning, Daniel Bauer ''threw his pen down on the desk and went outside,'' instructed Harrington to change the plate, and agreed to accept responsibility when Harrington ''told him I'd drive the truck under the total understanding that he was responsible for anything'' such as a traffic ticket.

On the following day, helper Mike Blaisdell was assigned to accompany Harrington and Peterson to the Maple Grove project. But, the tractor had only two seats. When Harrington and Blaisdell brought that fact to Daniel Bauer's attention, testified Harrington, Bauer ''said that it was too expensive to run a second vehicle over there just to have him sit in the cab, and, there again, I got his permission that he was going to take any responsibility for any tickets or anything that might occur with doing this.'' Blaisdell sat in the cab on a 5-gallon pail over to, and coming back from, Maple Grove.

On one of the trips to the Highland Park Bank project, Harrington was stopped by the Minnesota Department of Transportation. He received a verbal warning for having an inoperable horn, a bad tire and, possibly, for hauling a trailer which exceeded the weight allowed by the license plate on it. When he reported what had occurred to Daniel Bauer that evening, Harrington testified that Bauer ''asked me why I didn't take a different route 'cuz there's 2 ways you can get on the freeway, and I told him this is the fastest way we always get on the freeway is to go the way we went,'' and ''We didn't know that they were sitting there for a DOT inspection.''

One or two weeks later, during mid-October, Harrington did travel the alternative route suggested by Bauer. Again, he was stopped by a state Department of Transportation officer. As it turned out, that happened because installer Donald Benysek, after having discussed the condition of Respondent's equipment with Harrington and Peterson, had telephoned that state agency and had reported on the condition of Respondent's vehicles. The officer told Harrington ''they received a complaint about . . . the vehicles being unsafe and hazardous to employees['] health,'' and he questioned Harrington about Respondent's equipment. He also issued another verbal warning, this time for expired tabs, a broken windshield, an inoperative brake light, and bad tires. According to Harrington, the officer ''said, tell your employer that we are here and we are aware of the problems and we will be watching and to [take] care of the problems of the truck.''

Harrington testified that when he did so that evening, Daniel Bauer complained that ''out of all the 30 years he's been in business he's never had problems with the Minnesota DOT like this before,'' and that it was ''funny that [Harrington] was the one that was always involved with these road side checks.'' Harrington denied that he had turned in Respondent and he did not deny having told Bauer that Benysek had been the one who had done so.[8] On the other hand, Daniel Bauer did not deny Harrington's testimony that, as their conversation had progressed that evening, ''I said I—people asked me questions if they were legal to drive them [the trucks] and I gave them my honest opinion and in my opinion they weren't legal.''

Two points must be covered before passing on to discussion of Harrington's union activities and of Respondent's perception about it. First, although Harrington may have re-

[8] Bauer likely did not believe that, however, for Peterson testified that he was told by Janet Bauer, ''they thought it was suspicious that—well, Scott and I were pulled over two days [sic] in a row, I believe it was, and they thought that was kind of odd that we would be pulled over like that.''

vealed to Daniel Bauer that Benysek had been the one who made the report to the Minnesota Department of Transportation, it is clear that Respondent's co-owners believed that Harrington had been involved in the complaints about their vehicles. So far as the evidence discloses, there had been no complaints from employees about the trucks and trailers before Harrington started working for Respondent during June. Respondent presented no evidence that Harrington's complaints had been but some of an already ongoing series of complaints about its vehicles. As set forth above, Janet Bauer said to Peterson that it was ''suspicious'' that Respondent's vehicles had twice been pulled over. However, Peterson had worked for Respondent since November of 1991 and there is no evidence that, prior to fall of 1995, he ever had been pulled over by a state transportation officer. So, if she entertained suspicions about those incidents, Janet Bauer likely was focusing her suspicions on Harrington.

That inference is strengthened by a remark made to Peterson following Harrington's termination. When he told Janet Bauer that he was not licensed to drive a Mac truck assigned to him, she walked away, mumbling loud enough for Peterson to hear, ''Well, I thought things would've been different by now.'' In sum, a preponderance of the evidence supports the conclusion that Respondent believed that Harrington had been involved in activity to promote job safety.

''Protesting an unsafe working condition can be protected activity under the Act if the employee so protesting has a good-faith, reasonable belief that such a condition exists.'' *Johnson-Stewart-Johnson Mining Co*., 263 NLRB 123, 123 (1982). See generally *NLRB v. Washington Aluminum Co*., 370 U.S. 9 (1962). Items such as an inoperable horn, bad tires, broken windshields, and inoperative brake lights present safety hazards to drivers and occupants of trucks. So, too, does transporting an excessive number of people in a tractor cab. Beyond that, directing an employee to drive an unlicensed or improperly licensed vehicle constitutes a direction to violate the law.

It should not be overlooked that, by the second time that Harrington had been stopped by a state transportation officer, Respondent had become party to the 1995–1998 collective-bargaining contract. Article 13 of that contract obliges Respondent to promote ''injury free operations'' and ''to abide by, and live up to the requirements of the several state and Federal Construction Safety Codes and Regulations.'' Thus, safety protests by Respondent's employees are encompassed both by Section 7 of the Act and by the contract between Respondent and the Union. See *NLRB v. City Disposal Systems*, 465 U.S. 822, 825–837 (1984).

To be sure, protests to Minnesota's Department of Transportation would be extracontractual. But, the ''mutual aid or protection'' provision of Section 7 of the Act has been held to ''protect[ ] employees from retaliation by their employers when they seek to improve working conditions through resort to administrative and judicial forums.'' *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565–566 (1978). Reports to the Minnesota Department of Transportation have not been shown to be inconsistent with the Union's position under its contract's safety article. Accordingly, there is no basis for concluding that such reports and, as well, conversations with state officers derogated from the Union's status as bargaining agent for Respondent's employees. Cf. *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50 (1975). Therefore, Harrington's protests to Respondent about improperly licensed vehicles and unsafe operation of them, and his disclosures to a state transportation officer of unsafe conditions of those vehicles, constitute activity encompassed by the ''mutual aid or protection'' provision of Section 7 of the Act.

The second point in this area is that there is ample basis for concluding that at least some of Harrington's activities were concerted, in fact, and that Respondent knew or, at least, suspected them to have been concerted. Harrington, Peterson, and Benysek, at least, had discussed among themselves some of the trucks' unsafe and illegal conditions. There is no evidence that any one of them—nor, for that matter, any of Respondent's other employees—had disagreed that illegal and unsafe vehicle conditions did exist. In such circumstances, Harrington's protests to Daniel Bauer and his reports to the transportation officer, during the second stop, had been an outgrowth of those discussions and were aimed at correcting unsafe and illegal conditions which had been discussed by those employees. See *Owens-Corning Fiberglas Corp. v. NLRB*, 407 F.2d 1357, 1365 (4th Cir. 1969); *NLRB v. Ben Pekin Corp*., 452 F.2d 205, 206–207 (7th Cir. 1971).

Furthermore, during the above-described conversation with Daniel Bauer, it is undisputed that Harrington had said that ''people asked me questions if they were legal to drive [the vehicles] and I gave them my . . . opinion that they weren't legal.'' That remark provided actual notice to Respondent that Harrington had been discussing the conditions of Respondent's vehicles with coworkers. Accordingly, by mid-October Respondent had possessed actual knowledge that Harrington was participating in ''concerted activities for the purpose of . . . mutual aid or protection,'' within the meaning of Section 7 of the Act.

As to Harrington's union activities, he had been one of the initial three employees sent to the Highland Park Bank project, where the assistant superintendent turned away those employees for lack of union cards. He also had been the only one of those three employees who returned on the following day when, for the same reason, the superintendent refused to allow respondent's employees to work there. Thereafter, he had been one of the employees who complained to the Union about not being compensated according to the contract, then only recently signed by Respondent. He made photocopies of pay stubs and submitted those copies to the Union. According to Market Recovery Director Witt, Harrington had been one source from whom the Union learned about the National City Bank project where employees of Respondent were discovered working without the Union's hiring hall having been contacted, as required by the current contract. In sum, during the fall, Harrington had been a common figure in incidents which involved Respondent and the Union.

Witt further testified that it had ''probably'' been ''from the middle of October on when Mr. Harrington was thinking about organizing the company and trying to help it get organized as far as the [U]nion is concerned,'' and, further, that it had been after then that Harrington had called about the National City Bank job. Harrington testified that on November 7 he had signed a card authorizing the Union to represent him and, moreover, that he had spoken in favor of the Union to other employees. Indeed, helper Blaisdell testified that, ''within a couple of days after [he] got the work permit'' for the National City Bank project, he had been approached by

Harrington about the Union. Eventually, Blaisdell also signed an authorization card. So, also, did mechanic Lynch testify that he had discussed the Union with Harrington. Peterson testified that he had heard Harrington talking to other employees about the Union and, during November, Peter began doing so, as well. In sum, Harrington had become an activist on behalf of the Union.

There can be no question about the Bauers' animus toward unionization of its employees. As discussed in section II, supra, Janet Bauer told Struss that Respondent would be forced to close if it had to compensate all its employees in accord with the contract's terms. During this proceeding, Respondent has renewed that position. When Benysek applied for employment with Respondent, during September, he submitted to Janet Bauer an employment application on which he had listed prior work at ''union shops.'' She looked at those entries and warned Benysek that unions ''had no place'' at Respondent. Benysek testified, without contradiction, that when he then was interviewed by Daniel Bauer, the latter had ''said that he didn't care for unions'' and ''wasn't going to have a union in his shop and that was basically it.'' Benysek was not the lone employee to described antiunion statements by Daniel Bauer.

Lynch testified that on November 19, the Sunday following Harrington's Friday discharge, he had received a telephone call at his home, at approximately 10:30 a.m., from Daniel Bauer. The latter asked Lynch to come to Respondent's Lake Elmo facility; Lynch did so. According to Lynch, ''the first question put to me was Dan wanted to know what my views were about unions,'' and Lynch responded that while unions were good to have, he was ''kind of turned off'' by their willingness to protect marginal workers and he would rather work where he could ''prove'' himself and be rewarded on his ''own merits instead of a set standard basically.''

According to Lynch, Bauer said ''that there just wasn't that much of a markup in installing,'' and that union wages could not be justified, that he could only pay $15 an hour ''tops,'' and that ''if he had to pay union scale wages that he'd have to close his doors.'' ''I didn't really respond to that at that point,'' testified Lynch.

Lynch further testified that Bauer also asked what Lynch ''thought of Scott Harrington's work habits.'' Lynch, then unaware that Harrington had been fired, replied that Harrington ''didn't really hit me as a very enthusiastic worker or something to that effect.'' According to Lynch, Bauer ''went on to say that, why is it always the workers that—I don't know. I guess in my own words right now—lazy or something like that, you know cause all the trouble. Something to that effect,'' or ''it's always the guys that don't work too well that cause problems.'' Lynch testified that Bauer did not explain what he meant by ''problems.''

The General Counsel alleges that Daniel Bauer's statements to Lynch constituted coercive interrogation and an unlawful threat of closure if Respondent had to pay union scale wages to its employees. Bauer did not dispute Lynch's description of what had been said during their meeting. He did assert that the Sunday meeting had been arranged between Lynch and himself on the preceding Friday. Lynch disputed that assertion.

Bauer also testified that the subject of unions had arisen when Lynch suddenly asked, ''Well, what are you going to do, go out of business?'' According to Bauer, ''one thing led to another'' and, after he had said that Respondent was not going out of business, ''it somehow got into the union thing and I did make the comment that if we were going to pay that union wage of the [Union] for the type of work that we are doing and the competition that we face we would be forced out of business.'' But, Lynch denied specifically that he had asked if Respondent was going out of business: ''No. I didn't ask him if he was going out of business.''

Lynch appeared to be testifying candidly, in contrast to Bauer, and I credit Lynch's description of the meeting. As to the threat of closure, under the Act an employer may make predictions about the precise effects of unionization. However, such ''prediction[s] must be carefully made on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond [the employer's] control.'' *Schaumburg Hyundai, Inc*., 318 NLRB 449, 450 (1995), citing *NLRB v. Gissel Packing Co*., 395 U.S. 575 (1969).

Neither when Daniel Bauer spoke to Lynch on November 17 nor during Janet Bauer's conversations with Struss did Respondent's co-owners explain any facts which would support their closure statements. More importantly, perhaps, Respondent produced no financial or other particularized evidence showing that its co-owners' closure warnings truly had constituted predictions, as opposed to threats. It should not be overlooked that the lion's share of Respondent's installation jobs are located outside of the geographic area encompassed by its contract with the Union. Thus, while Respondent's installation profit margin may be small, payment of contractual wages and benefits would have to be made on only a minority of those jobs. Viewed from the perspective of an employee, therefore, Bauer's closure warning did not square with the reality of Respondent's business operations.

Furthermore, Daniel Bauer chose to make those closure remarks to Lynch during a conversation in which Bauer also raised the subject of Harrington who, by then, had been fired. As noted above, at the time of their conversation, Lynch had been unaware of that discharge. Nonetheless, in due course, Lynch would learn about it. Thereafter, its significance, in the context of Bauer's closure warning, would be left to linger with Lynch, as an illustration of Respondent's willingness to retaliate against employees who supported the Union. In the totality of the foregoing circumstances, I conclude that Daniel Bauer unlawfully threatened closure of Respondent, should it be forced to pay union wages. Such a threat naturally would deter an employee's support for representation by a union and, therefore, violated Section 8(a)(1) of the Act.

Bauer did not deny—in fact, he seemed to be conceding—that he had questioned Lynch about the latter's views about unions. Bauer claimed that he had done so during the course of a general conversation about unions and that Lynch had initiated that conversation. I do not credit his testimony. Rather, I conclude that, as described by Lynch, Daniel Bauer had opened discussion by asking for Lynch's ''views . . . about unions.'' Bauer advanced no purpose for having directed that question to Lynch. He gave Lynch no explanation for doing so. Lynch was not an open activist on behalf of the Union. Bauer is a co-owner and president of Respondent and his conversation with Lynch took place in an office, where the two of them were alone. Bauer never claimed that

he had assured Lynch that the latter did not need to answer the question. Nor did Bauer claim that he had assured Lynch that he would not be subjected to reprisals as a result of his answers. Instead, as pointed out above, Bauer injected into the conversation a discussion of Harrington, who only recently had been discharged unlawfully, as discussed below. Moreover, during that same conversation, Bauer unlawfully threatened closure of Respondent. In these circumstances, I conclude that Bauer's questioning of Lynch had been coercive and, accordingly, constituted interrogation which violated Section 8(a)(1) of the Act.

Of course, the Bauers' above-described statements to Benysek and Daniel Bauer's unlawful statements to Lynch, as well as Respondent's unlawful unwillingness to fully honor its contract with the Union, supply evidence of animus. To be sure, there is no direct evidence that Janet or Daniel Bauer had been aware of Harrington's activities on behalf of the Union. Nonetheless, there is ample evidence supporting an inference of such knowledge or, at least, that the Bauers had suspected Harrington of being a union activist.[9]

Lynch testified that the Union had been ''pretty much discussed, I guess, amongst all of the, you know, employees'' at Respondent. He specifically identified lead installer Haehn as one participant in such discussions. Although he testified as a witness for Respondent, Haehn never denied having participated in discussions about the Union. More significantly, Blaisdell testified that, after he had been approached by Harrington about joining the Union, he had talked to ''everybody'' and had gotten opinions from everyone about doing so. One person to whom he talked was Jeff Bauer, the nephew of Janet and Daniel Bauer. It also should not be overlooked that Respondent employs a relatively small employee complement, between 12 and 18 employees. In the foregoing circumstances, it is likely that discussions among the employees about the Union, and Harrington's support for it, eventually were brought to the attention of Janet and Daniel Bauer.

Such a conclusion tends to be confirmed by Daniel Bauer's answer to a question about his knowledge prior to November 17 about Harrington's union activity. Bauer answered guardedly, ''Um—not his activity as I know it today about signing these cards. At that time I probably heard that the [U]nion had made the comment to somebody that our installers were in the'' Union. Of course, when he had picked up his work permit for the Highland Park Bank job, Harrington had been one employee whom Struss informed about being covered by the current contract. And a denial confined to not knowing the full extent of Harrington's union activities—to not knowing that he had signed and solicited authorization cards—hardly suffices as a denial of knowledge about Harrington's support for the Union and his discussions with other employees favoring the Union.

That the Bauers suspected Harrington of being a union supporter is further shown by certain remarks which they made. As described above, after the first three employees had been turned away from the Highland Park Bank project, Janet Bauer had opined to Peterson that a possible cause had been those employees' dress which led personnel on that site to suspect that they were nonunion. That remark is some evidence that Janet Bauer had been attempting to figure out why those employees had been asked for union cards. Her husband's postdischarge question to Lynch about the latter's opinion of Harrington's work ethic, in the context of unlawful interrogation of Lynch and an unlawful threat of closure, supplies a further indication that Respondent at least suspected that Harrington had been involved with the Union. No other reason for abrupt mention of Harrington, in such a context, was advanced by Daniel Bauer, nor is one suggested by the other evidence. More importantly, at no point did Daniel Bauer explain what he had meant by referring to Harrington as a ''problem'' or as having caused ''trouble.'' In the context of Bauer's other remarks, either term, whichever was used, appears to have been a euphemism for the Union.

Both of those words could also have been a reference to Harrington's activities in connection with the safety and legality of Respondent's vehicles. Obviously, Daniel Bauer knew that Harrington had been complaining about those conditions and, also, knew that Harrington had told other employees, whenever they inquired, that he believed that Respondent was operating its vehicles illegally. Janet Bauer's above-described postdischarge mumbled remark to Peterson, when the latter had protested about driving an improperly licensed truck, is evidence of her belief that Harrington had been the primary source of Respondent's problems with complaints about its vehicles. It is not illogical for an employer to connect complaints about its equipment to union organizing efforts—to suspect that the former is related, or has bred, the latter. Thus, a complaining employee becomes the logical target of suspicion whenever union activity then surfaces.

The totality of the foregoing considerations support a conclusion that Respondent's co-owners at least believed that Harrington had been a supporter of the Union. The Bauers' statements to Benysek, Janet Bauer's statements to Peterson and, especially, Daniel Bauer's statements to Lynch establish that Respondent's co-owners knew about some of Harrington's statutorily protected activities, were antagonistic toward such activities, and, in Daniel Bauer's case, would not be reluctant to retaliate against employees because of those statutorily protected, particularly union, activities.[10] Harrington was terminated relatively shortly after he began voicing complaints about Respondent's equipment, and very shortly after verbal warnings began being issued by the Minnesota Department of Transportation. He also was terminated shortly after union activity began to surface among Respondent's employees. Accordingly, the General Counsel has shown that protected concerted activity and union activity had been a factor in Respondent's decision to discharge Harrington.

[9] An employer violates the Act whenever it retaliates against an employee on the basis of suspicion or belief no less than when it does so based on actual knowledge of union or protected concerted activities. *Handicabs, Inc*., 318 NLRB 890, 897 (1995), enfd. 95 F.3d 681 (8th Cir. 1996) (and cases cited therein), and 117 S.Ct. 2508 (1997).

[10] In the context of Respondent's operations, it hardly makes a difference whether the Bauers' remarks represented their personal opinions or those of Respondent, when uttered to employees. The Bauers are Respondent's owners. Their opinions are inherently those of Respondent.

Nevertheless, argues Respondent, such a showing is outweighed by its showing that Harrington would have been discharged on November 17, in any event:

> There is ample evidence that [Respondent] discharged Harrington based on his performance and attitude on the job. Within a month after he stated working at [Respondent], the Bauers already noticed some of his shortcomings in terms of his timekeeping, attitude and lack of initiative. Over the course of the next several months, [Respondent] also received reports of Harrington's poor workmanship on several jobs, and complaints from two significant [Respondent] customers regarding Harrington's attitude. The two customers requested that Harrington not be assigned to projects involving the customers' products. These complaints, combined with the incidents of poor workmanship and use of poor judgment in his excessive tool purchases, provided more than sufficient cause to discharge.

Of course, in the final analysis, the ultimate question is not whether Respondent had cause to discharge Harrington, but whether it has presented evidence that whatever cause existed had been the actual or true motivation for its discharge decision.

''The mere presence of legitimate business reasons for disciplining or discharging an employee does not automatically preclude the finding of discrimination.'' *J. P. Stevens & Co. v. NLRB*, 638 F.2d 676, 681 (4th Cir. 1981). For, ''the pivotal factor is motive'' (citation omitted); *NLRB v. Lipman Bros., Inc*., 355 F.2d 15, 20 (1st Cir. 1966), and the ultimate ''determination which the Board must make is one of fact—what was the *actual motive* of the discharge?'' (Emphasis in original.) *Santa Fe Drilling Co. v. NLRB*, 416 F.2d 725, 729 (9th Cir. 1969). In conducting analysis to reach that determination, ''The employer alone is responsible for its conduct and it alone bears the burden of explaining the motivation for its actions.'' *Inland Steel Co*., 257 NLRB 65, 65 (1981).

Respondent identifies Daniel Bauer as the official who made the decision to discharge Harrington. When his testimony is examined beyond the surface, however, it turns out to be sometimes uncorroborated, other times internally contradictory, and still other times inconsistent with undisputed or objective facts. Those penultimate conclusions are illustrated by a review of the record, some examples of which are discussed below, and reinforce the ultimate conclusion which I reached while observing Daniel Bauer as he testified: that he was not being candid and that no reliance can be placed on his descriptions and accounts of events.

Bauer testified that, during the first month of Harrington employment,

> I would get comments from the supervisor-lead installers that were not necessarily positive, that he appeared to lack some of the experience and potential that he portrayed in his interview so I began—started to have doubts about his ability to handle the work that we do, and there seemed to be a problem in relating to customers or the contractors at a particular site. He seemed to lack a little bit of PR that is required in our type of work.

As a result, testified Bauer, ''Approximately a month after he started we did meet with him and we went over some of the things that Jan had made notes on and things that I had observed or heard during that month, the previous month.''

With respect to the specific subjects discussed during that meeting, Daniel Bauer identified, ''The hours that he would report on his time and expense report generally exceeded the hours that somebody he was working with would put down on their report,'' ''That we had some complaints about his conduct on the jobsite, his cockiness for lack of a better word and that was used by one of the customers,'' and that ''Scott had a tendency it seemed like to complain that the conditions at the site—maybe there is too many workers are there or the wall opening is not correct, the ground is rough or—there was always the job site wasn't right[.]'' To support that testimony, notes of Janet Bauer, made in connection with the meeting, were introduced.

Those notes bear the date ''8/13/95.'' To the extent pertinent, they enumerate the subjects of ''Excessive hours,'' a ''Tendency to stand [and] Look,'' and ''Complains about jobs.'' Yet, there is no mention in those notes that Harrington's complaints were being directed to customers, as opposed to Respondent's personnel.

According to Daniel Bauer, continued dissatisfaction with Harrington's performance led to a second meeting, ''I think it would be late October.'' As to the substance of that meeting, Bauer testified:

> I don't remember all the words but I again discussed the problem and the complaints from the customers and I discussed with him at some point that it appeared that he needed additional training or experience to be able to handle it, that my opinion from what I had ascertained to date that he was not qualified to do the installation work, and I think I suggested that he get some schooling.

Bauer testified that he also suggested that Harrington might start looking for another job.

By the time of that meeting, testified Daniel Bauer, he had decided to terminate Harrington because

> I've never had anyone draw anywheres near the amount of complaints in such a short period of time, and I think I could honestly say that in thirty some installers that I've worked with over the years if I grouped them all together I don't think I had that many complaints about an individual.

But, Respondent did not then discharge Harrington. It delayed doing so until November 17 because, testified Daniel Bauer, during ''fall of '95 we happened to hit a real busy period where it had been slow prior to that and it was a little slow after that,'' which then allowed Respondent to fire Harrington on November 17 without impairing its ability to complete then-existing installation projects.

Of course, the fact that an employee engages in union or protected concerted activity, or both, does not immunize that employee from discharge, if there is justified cause for doing so. Indeed, in such circumstances, even ''the circumstance that the employer welcomed the opportunity to discharge does not make it discriminatory and therefore unlawful.'' (Footnote omitted.) *Klate Holt Co*., 161 NLRB 1606, 1612

(1966). But, as pointed out above, there were problems presented by Daniel Bauer's testimony about the supposed reasons which he claimed had led him to the decision to terminate Harrington.

In the first place, the ''many complaints'' by customers, which he claimed had occurred, were supported by specific evidence of only two complaining customers. And one of them did not complain until after Daniel Bauer's purported ''late October'' decision to fire Harrington.

The two customers identified by Daniel Bauer were Dan Chastanet of Security Products and Jay Gibson of Lefebure Corporation. Neither Chastanet nor Gibson was called as a witness to corroborate Bauer's testimony about their asserted complaints. However, Respondent never represented, nor presented evidence to support a representation, that either man was unavailable to testify in support of Daniel Bauer's testimony about them.

Beyond that, the complaints attributed to both do not correspond with the time line of Respondent's above-described meetings with Harrington, nor with the asserted discharge decision at the time of the second meeting between Bauer and Harrington. According to Respondent's evidence, the first meeting with Harrington had occurred on August 13. As set forth above, Bauer testified that, during that meeting, he had related to Harrington, ''That we had some complaints about his conduct on the job site.'' If so, such complaints were not the ones which Bauer identified as having been made by Chastanet and Gibson. For, Janet Bauer's notes show that it had not been until the week of October 9 that there was a ''Complaint Scott Harrington by Dan Chastanet,'' in connection with the ''Meridian Bank St. Paul'' project. And, not until ''11/9/95'' did she record a ''Complaint regarding Scott Harrington and Mike Blaisdell on the St. Croix Falls—Bank of Osceola'' project, made by Jay Gibson.

In fact, Janet Bauer's notes concerning the ''8/13/95'' meeting with Harrington mention ''Complain about jobs,'' but they make no reference to those complaints having been made by customers. During cross-examination, Daniel Bauer was asked to identify the customers whose purported complaints—specifically, about ''cockiness''—had supposedly been discussed during the August meeting with Harrington. Bauer responded, ''I think that was on the Meridian Bank. Security Products[,] Dan Chastanet.'' When it was pointed out to Bauer that the Meridian Bank project had not occurred until October, he claimed, ''It must have been a different one then.'' Pursued for the identity of that customer, however, Bauer answered lamely, ''I can't think of it off the top of my head.''

Yet, his wife apparently memorialized customer complaints. Respondent produced her notes about the October Chastanet complaint and one made by Jay Gibson during November. However, no memorandum by her was produced concerning any pre-August 13 customer complaint about Harrington. ''Not to my knowledge,'' answered Bauer when asked if there was any documentation of a complaint about Harrington prior to the August meeting.

Another aspect of Daniel Bauer's testimony pertaining to that meeting concerned asserted ''Comments from the supervisor-lead installers that were not necessarily positive[.]'' As set forth in section I, supra, Respondent employed apparently three lead installers—Haehn, Ruter, and Wienke—when it had employed Harrington. Nevertheless, other than generalized testimony, about Harrington ''lack[ing] some of the experience and potential that he portrayed in his interview,'' Bauer never testified with particularity about specific complaints from specific lead installers—as to which ones made which complaints.

Lead installer Haehn did testify that, while having worked with Harrington on ''ten or twelve different job sites maybe,'' he had concluded that Harrington was ''not a eager go-getter type of worker,'' and was ''content with not aggressively attacking what needed to be done.'' But, Haehn never claimed that he had reported those conclusions to the Bauers. And if he had done so, Haehn did not testify that he had made such a report as early as before August 13. Indeed, Haehn's testimony appears to have been based on his observations of Harrington's work during the entire approximately 5-month period that Harrington had worked for Respondent. Haehn never claimed that he had reached those conclusions prior to August 13. Moreover, in testifying to his observations about Harrington, Haehn qualified them by pointing out, ''When he was . . . asked to do something he would do it. I'm not saying he avoided my direction.''

It must not be overlooked that there does appear to be support for Daniel Bauer's complaint that Harrington was not, as Lynch put it after Harrington's discharge, ''a very enthusiastic worker.'' Indeed, in connection with the complaint about the Meridian Bank project, Janet Bauer's note recites that Chastanet had protested that Harrington, ''Did nothing—stand around and wait'' during the time that Chastanet had been on that project. Still, Bauer testified that Chastanet had been upset that installation at Meridian Bank could not be completed on the day that he had called to complain. It is undisputed that, on that occasion, Security Products had added installation of a night depository to the already scheduled installation work to be performed on that project. It also is uncontested that Security Products had not made that addition until Respondent's installers had shown up that morning to perform the scheduled installation work.

As set forth in section I, supra, it ordinarily takes two employees 4 to 12 hours to install night depositories. For a proficient employee to install a drive-in lane, it takes a day. Harrington, of course, was a relative beginner insofar as Respondent's installations were involved. So, it is hardly surprising that all installations at Meridian Bank could not have been completed in a day, especially as it is uncontroverted that Harrington had been obliged to spend part of that day hauling, from Security Pacific to Meridian Bank, an oversized night depository vault in a truck which had bad brakes. In consequence, while Chastanet was upset about inability of Respondent to complete installation that day, it cannot be objectively said that anything Harrington did, or did not do, was the reason. In addition, it seems that, at the time, Respondent understood as much.

Working with Harrington at Meridian Bank had been Peterson. He had worked for Respondent since November 1991. Thus, he had been the more senior of the two employees performing installations at that site. He was questioned by Janet Bauer about what had occurred at Meridian Bank. But, not about the length of time being taken to complete work there. Nor about whether or not Harrington had worked diligently there. Rather, she asked only, according to Peterson, ''If Scott had a bad attitude that day at the Meridian Bank, the previous day.'' At no point, so far as the record

shows, did she say anything to Peterson about Chastanet's ''Did nothing—stand around and wait'' report. Yet, had she been concerned about that aspect of Chastanet's complaint, it seems likely that, in the course of asking Peterson about another of Chastanet's complaints, she also would have asked about the ''Did nothing'' one. However, she did not do so and that is some indication that she did not give it serious weight in the circumstances.

Another indication that Harrington had not been so indolent a worker as Respondent now seeks to portray arises in connection with the ''Excessive hours'' portion of Janet Bauer's August 13 note. With regard to it, Daniel Bauer answered vaguely when questioned about it: ''It's my understanding that on a comparative basis if you just looked at his reports compared to the persons that he was working with he would tend to always have more hours than the other person.'' Harrington, however, testified that Janet Bauer ''asked me what time I was arriving in the morning, and I told her 7 a.m., and she said well you don't have to arrive that early unless we specifically request you to because I'm getting in more hours than anybody else doing that.''

Respondent never contended that Harrington had been falsifying his reported worktime. Nor has it contended or shown that Harrington performed no work when he arrived early for work. The fact that he had been reporting early for work hardly squares with Respondent's effort to portray him as a ''lazy'' worker. In any event, there is no evidence of any further incidents involving ''Excessive hours'' after Harrington had been instructed not to report early for work.

Refocusing on Daniel Bauer's testimony about customer complaints, a major discrepancy arose in connection with his purported ''late October'' discharge decision and the timing of such complaints upon which he supposedly had relied to reach that decision at that time. He testified that both Chastanet and Gibson had requested that Harrington no longer be assigned to Security Pacific and Lefebure, respectively, projects. Bauer testified that, in response, he explained to Chastanet and Gibson that Respondent intended to fire Harrington, but would not be able to do so until the press of installation business eased and, until then, he might have to continue assigning Harrington to their firms' projects. Asked when those conversations with Chastanet and Gibson had taken place, Bauer responded initially, ''It would be about the time of the Meridian job. Shortly after the Meridian job.'' Yet, Janet Bauer's notes reveal that Gibson's complaint, in connection with a project at ''St. Croix Falls—Bank of Osceola,'' had been received on ''11/9/95''—almost a month after the Meridian Bank complaint by Chastanet. Daniel Bauer gave no testimony about any similar conversation with Gibson in connection with any other Lefebure project. The record affords no basis for inferring that there likely had been any conversation about Harrington between Daniel Bauer and Gibson, such as Bauer described, ''Shortly after the Meridian job.''

In sum, had Daniel Bauer truly made his discharge decision in ''late October,'' he could not have made it on the basis of Gibson's complaint about events at Bank of Osceola. Either Bauer was not being candid when he claimed that Gibson's complaint had been a factor in the discharge decision. Or, he was not being candid about having decided in ''late October'' to discharge Harrington. In fact, from the evidence considered as a whole, Bauer's testimony about both those subjects appeared contrived. While testifying, Bauer appeared to be trying to cobble together every possible adverse event in an effort to construct a legitimate defense that would pass muster for having fired Harrington. That conclusion tends to be supported by Bauer's above-described question to Lynch on November 19, about the latter's opinion of Harrington's work habits. Bauer did not explain why he had asked Lynch about Harrington's work habits and, inasmuch as Harrington already had been terminated by November 19, no legitimate reason for that question is suggested by the record. It does go without saying, of course, that if one can accumulate and throw enough mud, perhaps some of it will stick. That seems an apt characterization of Bauer's defense to his decision to discharge Harrington.

An example of such an effort occurs in connection with Respondent's above-mentioned complaint about Harrington's tool purchases. Daniel Bauer testified that Harrington ''one day went out and purchased approximately a thousand dollars worth of tools and hadn't called anyone in the office and . . . got any kind of permission to purchase them[.]'' The first part of that particular testimony is demonstrably untrue. All of Respondent's records pertaining to tool purchases made by Harrington at its expense were produced and have been received into evidence. Not one of them is for $1000. Indeed, collectively, they amount to $849.94.

Furthermore, that total figure was reached as a result of tool purchases made between July 27 and October 10: amounting to $73.11 on July 27, $153.04 on August 2, $356.09 on August 24, and $267.70 on October 10. Of course, by that last date, Harrington had voiced complaints about Respondent's equipment and had been stopped at least one, and possibly twice, by the Minnesota Department of Transportation. By then, in addition, the Union had arrived on Respondent's scene.

It is difficult to ascertain how Respondent could genuinely fault Harrington for having made those tool purchases. It never contended that he had not needed to purchase the tools. Daniel Bauer conceded that ''it isn't the dollar amount. I know it takes about $1000, $1200 to outfit an installer[.]'' Lynch and Peterson each described having made similar tool purchases at Respondent's expense. Harrington testified that ''when I was trained,'' he had been told that he should purchase a tool at Respondent's expense whenever on a job where he needed a tool to complete the project. Daniel Bauer admitted that, prior to speaking with Harrington after the October 10 tool purchase, he never had spoken with Harrington about tool purchases. In the end, Respondent's defense in this area is left with Daniel Bauer's assertion that Harrington had displayed ''poor judgment'' by having made the purchases without Respondent's prior consent. Yet, he never really explained what he meant by that. And it is undisputed that Harrington had been turning in the receipts for those purchases, as he had made them. So, surely Respondent had knowledge of them prior to October.

As to the quality of work performed on various job on which Harrington worked, there had been problems. Yet, examination of each situation identified by Daniel Bauer reveals that there is not so firm a basis for blaming Harrington as Respondent now appears to be attempting. In the first place, Harrington was not working alone on any of those projects. As pointed out above, Peterson had been working with him at Meridian Bank. Lead installer Haehn had been

with Harrington at St. Croix Falls when Harrington's weld failed and two bank vault panels toppled over. In fact, Haehn admitted that he had directed Harrington to make that weld in the manner which Harrington had done. The problem appears to have been less one of poor welding by Harrington and, in reality, more a failure of Haehn's idea to tack weld those panels.

Janet Bauer's ''11/9/95'' note about Gibson's complaint at Bank of Osceola pertains to a project at which Harrington had worked with Blaisdell. True, the latter was a helper and Harrington an installer. Yet, at that time, Harrington had been working for Respondent for a little over 4 months only and Daniel Bauer acknowledged that it takes time to learn the type of installation work which Respondent's employees perform. Beyond that, most of Gibson's complaints appear to have pertained more to Blaisdell or, at least, no less to Blaisdell than to Harrington.

For example, the note recites that Gibson complained that Respondent's employees at the site had acted like ''a couple of monkeys on drugs.'' In fact, while at that project, Blaisdell had been on medication. As Janet Bauer's note recites, ''Mike [Blaisdell] had been to the dentist at 8:30 AM for an infected tooth and was on antibiotics.'' Other than the note's use of the plural, there is no evidence that Harrington had acted out of the ordinary while at Bank of Osceola. Of course, Gibson was never called to explain whether he had used the plural while talking to Janet Bauer and, if so, what he had meant in regard to Harrington.

Her note also states that Blaisdell admitted having been ''unshaven'' while at Bank of Osceola. No similar reference is made in the note with regard to Harrington. So, to the extent that Gibson might have complained about unshaven employees of Respondent, in talking about someone appearing to be on drugs, that would only have applied to Blaisdell. And Janet Bauer's note establishes that Respondent knew that.

Daniel Bauer claimed that Gibson had complained about ''scrap that was not picked up'' when Respondent's employees left the Bank of Osceola project. But, he was unable to explain to what Gibson had been referring. His wife's ''11/9/95'' note refers to no more than a ''box . . . from window package'' that had not been removed from that site. Interestingly, Daniel Bauer testified, ''I didn't really hear about the box,'' and ''I never knew that this box was a big issue.'' If so, that would have to mean that he had not read his wife's note about her conversation with Gibson and, in turn, that he cannot now assert that he had relied on what is written in it as a factor in his decision to discharge Harrington. Of course, an assertion that he had relied on that not in arriving at his discharge decision is difficult for Bauer to make in any event, since the note was prepared after he purportedly had made his decision to fire Harrington.

The note also reveals that Gibson had complained that the vision window had been installed in a manner that left it out of plumb or not level. That is a serious complaint, but incorrect installation appears not to have been a unique occurrence. Haehn testified to deficiencies in the installation at Highland Park Bank where Peterson, as well as Harrington, had performed the installation work. Haehn and Daniel Bauer freely criticized Harrington for that installation. But, neither said anything about the more senior installer, Peterson, in connection with Highland Park Bank. Beyond that, it is undisputed that, during October or November, nephew Jeff Bauer had installed crookedly a night deposit drive-up window at Chanhassan and that then-lead installer Wienke had to correct that installation. Installer Carl Stayberg was forced to remove and reinstall an improperly installed drive-up window at a bank in Salem, Wisconsin. Benysek and another employee had initially installed that window. However, there is no evidence that Respondent took any disciplinary action against those two employees, or even mentioned the improper installation to either one of them.

In sum, it appears clear that Harrington had not been a model employee while working for Respondent. Nonetheless, there is no basis for concluding that Respondent expected its installers to be ideal employees. It appears to have tolerated shortcomings, at least before and, for a while, during the period when Harrington was complaining about unsafe and unlawful vehicles and, also, during the initial period after signing the current contract with the Union. Its abrupt unwillingness to continue tolerating Harrington's shortcomings is the actual issue presented here for resolution. Respondent's only explanation as to that issue was provided by Daniel Bauer who, as stated above, did not appear to be testifying credibly. The factors reviewed above, disclosed by a review of the record, reinforce my conclusion based on his seeming lack of candor while testifying. Consequently, I conclude that Respondent has failed to credibly show that the discharge decision had been motivated by an accumulation of unsatisfactory performance which it would not have tolerated absent the protected concerted and union activities of Harrington.

As concluded above, the General Counsel has presented evidence that known or suspected protected concerted activity and union activity had motivated Respondent to discharge Harrington on November 17. In light of that evidence, the burden shifts to Respondent to present evidence that, regardless of what it knew or suspected regarding Harrington's statutorily protected activities, and regardless of its animus toward such activities, it would have discharged Harrington in any event. See *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). See also *United Exposition Service Co. v. NLRB*, 945 F.2d 1057, 1059–1060 (8th Cir. 1991). Respondent has failed to satisfy that burden, because the testimony which it has presented to that effect is not credible and there is no independent evidence which would support a conclusion that Harrington would have been discharged regardless of Respondent's knowledge and suspicions about his statutorily protected activities.

Therefore, a balancing of the totality of the evidence presented in this proceeding establishes that a preponderance of the credible evidence shows that Harrington had been discharged, because of known and suspected union activity and participation in concerted activity for mutual aid and protection of employees and, conversely, fails to credibly show that Harrington would have been discharged had he not engaged, and been suspected of engaging, in those statutorily protected activities. Therefore, I conclude that his discharge violated Section 8(a)(1) and (3) of the Act.

CONCLUSIONS OF LAW

Diversified Bank Installations, Inc. has committed unfair labor practices affecting commerce by discharging Scott Har-

rington for engaging, and being suspected of engaging, in concerted activities for mutual aid and protection of employees, by coercively interrogating an employee, and by threatening to close if forced to pay union-scale wages to its employees, in violation of Section 8(a)(1) of the Act; by discharging Harrington because of his known and suspected support of, and activities on behalf of, International Association of Bridge, Structural and Ornamental Iron Workers, Local Union 512, AFL–CIO, a labor organization within the meaning of the Act, in violation of Section 8(a)(3) and (1) of the Act and, by failing and refusing to honor and by repudiating its collective-bargaining contract with that labor organization, as the exclusive collective-bargaining agent of the employees in the appropriate bargaining unit described in that contract, by failing and refusing to meet and bargain with that labor organization about matters arising under the contract and by seemingly withdrawing recognition of that labor organization during the term of that contract, and by failing and refusing to provide relevant information requested by that labor organization which is necessary for it to perform its duties as the representative of the employees in the appropriate bargaining unit described in that contract, in violation of Section 8(a)(5) and (1) and Section 8(f) of the Act. However, no other violations alleged in the complaint have been committed.

REMEDY

Having concluded that Diversified Bank Installations, Inc. has engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and, further, that it be ordered to take certain affirmative action to effectuate the policies of the Act. With respect to the latter, it shall be ordered to, within 14 days from the date of this Order, offer Scott Harrington full reinstatement to his job of installer, dismissing, if necessary, anyone who may have been hired or assigned to perform that job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges. In addition, within 14 days from the date of this Order, it shall remove from its files any reference to Harrington's unlawful discharge and, within 3 days thereafter, notify Harrington in writing that this has been done and that the discharge will not be used against him in any way. Further, it shall be ordered to make Scott Harrington whole for any loss of earnings and other benefits suffered as a result of the discrimination directed against him, with backpay to be computed on a quarterly basis, making deductions for interim earnings, *F. W. Woolworth Co*., 90 NLRB 289 (1950), and with interest to be paid on amounts owing, as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Diversified Bank Installations, Inc. also shall be ordered to recognize and bargain with International Association of Bridge, Structural and Ornamental Iron Workers, Local Union 512, AFL–CIO, and to comply with the terms of its collective-bargaining contract with that labor organization, from September 27, 1995, through the expiration of that contract on April 30, 1998. In addition, Diversified Bank Installations, Inc. shall be ordered to make whole the employees covered by that contract and the above-named labor organization for any losses they may have suffered as a result of its failure to comply with that collective-bargaining contract in the manner prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), with interest, as computed in *Florida Steel Corp*., 231 NLRB 651 (1977). Diversified Bank Installations, Inc. also shall be ordered to make the appropriate fringe benefits funds whole for losses suffered as a result of its delinquencies in failing to make contractually required contributions to these funds. See *American Thoro-Clean*, 283 NLRB 1107, 1109 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[11]

ORDER

The Respondent, Diversified Bank Installations, Inc., Lake Elmo, Minnesota, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating employees about their union sympathies and threatening to close if forced to pay union-scale wages.

(b) Discharging, or otherwise interfering with, restraining or coercing Scott Harrington, or any other employee, because of actual or suspected concerted activity for mutual aid or protection of employees.

(c) Discharging or otherwise discriminating against Scott Harrington, or any other employee because of actual or suspected activity on behalf of International Association of Bridge, Structural and Ornamental Iron Workers, Local Union 512, AFL–CIO or any other labor organization.

(d) During term of the collective-bargaining contract with the above-named labor organization, through its expiration on April 30, 1998, refusing to meet with, and withdrawing recognition from, the above-named labor organization as the exclusive collective-bargaining representative of all employees in an appropriate bargaining unit of:

> All full-time and regular part-time employees performing field installation work for Diversified Bank Installations, Inc. in the Minnesota counties of Otter Tail, Wadena, Todd, Morrison, Mille Lacs, Kanabec, Chisago, Isanti, Benton, Stearns, Douglas, Grant, Traverse, Stevens, Pope, Big Stone, Swift, Kandiyohi, Meeker, Wright, Sherburne, Anoka, Washington, Ramsey, Hennepin, Carver, McLeod, Renville, Chippewa, Lac Qui Parle, Yellow Medicine, Lyon, Redwood, Brown, Sibley, Nicollet, Scott, Dakota, LeSueur, Rice, Goodhue, Wabasha, Winona, Olmsted, Dodge, Steele, Waseca, Blue Earth, Watonwan, Cottonwood, Faribault, Freeborn, Mower, Fillmore, and Houston; excluding office clerical employees, guards and supervisors as defined in the Act.

(e) Repudiating the collective-bargaining contract with the above-named labor organization during its term, from September 27, 1995, through its expiration on April 30, 1998, by failing to pay contractual wages, by failing to make contractually required contributions to fringe benefit funds, and by failing to comply with all contract terms with respect to

[11] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

all employees in the appropriate collective-bargaining unit described in subparagraph (d), above.

(f) Refusing to provide relevant information requested by the above-named labor organization which in necessary for it to perform its duties as the exclusive bargaining agent for all employees in the appropriate collective-bargaining unit described in subparagraph (d), above.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by the National Labor Relations Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) During the term of the collective-bargaining contract from September 27, 1995, through its expiration on April 30, 1998, recognize and bargain with the above-named labor organization as the exclusive collective-bargaining representative of all employees in the appropriate bargaining unit described in paragraph 1(d), above.

(b) Honor the terms of the collective-bargaining agreement with the above-named labor organization, from September 27, 1995, through its expiration on April 30, 1998, by paying contractual wage rates, by making contractually required contributions to fringe benefit funds, and by complying with all other terms for all employees in the appropriate bargaining unit described in paragraph 1(d), above.

(c) Make whole all employees, the above-named labor organization, and fringe benefit funds, in the manner set forth in the remedy section, for any losses they may have suffered as a result of failure to adhere to the collective-bargaining contract with the above-named labor organization from September 27, 1995, through its expiration on April 30, 1998.

(d) Immediately supply the above-named labor organization with all information requested in its letters of December 26, 1995, and January 17, 1996, except for employees' social security numbers and for installation jobs performed between May 1 and September 26, 1995, and installation jobs performed outside of the 55 Minnesota counties enumerated in paragraph 1(d), above.

(e) Within 14 days from the date of this Order, offer Scott Harrington full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges.

(f) Make Scott Harrington whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of this decision.

(g) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts of backpay due under the terms of this Order.

(h) Within 14 days from the date of this Order, remove from its files any references to the unlawful discharge of Scott Harrington, and within 3 days thereafter, notify Scott Harrington in writing that this has been done and that the discharge will not be used against him in any way.

(i) Within 14 days after service by the Region, post at its Lake Elmo, Minnesota facility copies of the attached notice marked ''Appendix.''[12] Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by its authorized representative, shall be posted by Diversified Bank Installations, Inc. and maintained by it for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. It shall take reasonable steps to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, it has gone out of business or closed the Lake Elmo facility involved in these proceedings, Diversified Bank Installations, Inc. shall duplicate and mail, at its own expense, a copy of the notice to all current employees and all former employees employed by it at any time since September 27, 1995.

(j) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to steps that it has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not found here.

[12] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT interrogate you concerning your union activities and sympathies.

WE WILL NOT threaten to close our business, because we are forced to pay union-scale wages.

WE WILL NOT discharge or otherwise interfere with, restrain, or coerce Scott Harrington, or any other employee, because of actual or suspected concerted activity for mutual aid or protection of employees.

WE WILL NOT discharge or otherwise discriminate against Scott Harrington, or any other employee, because of actual or suspected activity on behalf of International Association of Bridge, Structural and Ornamental Iron Workers, Local Union 512, AFL–CIO or any other union.

WE WILL NOT during the term of our collective-bargaining contract from September 27, 1995, through its expiration on April 30, 1998, refuse to meet with, or withdraw recognition

from, the above-named Union as the exclusive bargaining representative of all employees in an appropriate bargaining unit of:

> All full-time and regular part-time employees performing field installation work for Diversified Bank Installations, Inc. in the Minnesota counties of Otter Tail, Wadena, Todd, Morrison, Mille Lacs, Kanabec, Chisago, Isanti, Benton, Stearns, Douglas, Grant, Traverse, Stevens, Pope, Big Stone, Swift, Kandiyohi, Meeker, Wright, Sherburne, Anoka, Washington, Ramsey, Hennepin, Carver, McLeod, Renville, Chippewa, Lac Qui Parle, Yellow Medicine, Lyon, Redwood, Brown, Sibley, Nicollet, Scott, Dakota, LeSueur, Rice, Goodhue, Wabasha, Winona, Olmsted, Dodge, Steele, Waseca, Blue Earth, Watonwan, Cottonwood, Faribault, Freeborn, Mower, Fillmore, and Houston; excluding office clerical employees, guards and supervisors as defined in the Act.

WE WILL NOT repudiate our collective-bargaining contract with the above-named Union during the term of that contract by failing to pay contractual wage rates, by failing to make contractually required contributions to fringe benefit funds, and by failing to comply with all of its terms for all employees in the above-described appropriate bargaining unit.

WE WILL NOT refuse to provide relevant information requested by the above-named Union which is necessary for it to perform its duties as the exclusive bargaining representative of all employees in the above-described appropriate bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights protected by the National Labor Relations Act.

WE WILL, during the term of our collective-bargaining contract, from September 27, 1995, through its expiration on April 30, 1998, recognize and bargain with the above-named Union as the exclusive bargaining representative of all employees in the appropriate bargaining unit set forth above.

WE WILL honor the terms of our collective-bargaining contract, effective from September 27, 1995, through its expiration on April 30, 1998, with the above-named Union by paying contractual wage rates, by making contractually required contributions to fringe benefit funds, and by complying with all of its terms for all employees in the above-described appropriate bargaining unit.

WE WILL make whole all employees, the above-named Union and fringe benefit funds for any losses they may have suffered as a result of our failure to comply with our collective-bargaining contract with the Union, from September 27, 1995, until the expiration of the contract on April 30, 1998.

WE WILL immediately supply the above-named Union with all information requested in its letters of December 26, 1995, and January 17, 1996, except for employees' social security numbers and for installation jobs performed between May 1 and September 26, 1995, and installation jobs performed outside of the 55 Minnesota counties enumerated in the above-described appropriate bargaining unit.

WE WILL, within 14 days from the date of this Order, offer Scott Harrington full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges he would have enjoyed had we not unlawfully discriminated against him.

WE WILL make Scott Harrington whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of this Order, remove from our files any references to the unlawful discharge of Scott Harrington, and WE WILL, within 3 days thereafter, notify Harrington in writing that this has been done and that the unlawful discharge will not be used against him in any way.

DIVERSIFIED BANK INSTALLATIONS, INC.